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In the

Supreme Court of the United States

OCTOBER TERM 1970

No. 693

BRANIFF AIRWAYS, INC., et al.,
Petitioners,

v.

THE TEXAS AERONAUTICS COMMISSION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners are three airlines holding certificates from the United States Civil Aeronautics Board, Braniff Airways, Incorporated, Continental Airlines, Inc., and Trans-Texas Airways, Inc. Respondents are the Texas Aeronautics Commission, a regulatory agency created by statute of the State of Texas, and Air Southwest Co., a corporation organized for the purpose of obtaining the certificate at issue in this case. Petitioners pray that a writ of certiorari be issued to review a judgment of the Supreme Court of Texas entered on May 13, 1970, and made final June 17, 1970, reversing the decision of the lower courts of Texas and reinstating and affirming an order of the Texas Aeronautics Commission

granting a certificate to Air Southwest in direct competition with petitioners over routes granted to petitioners by the Civil Aeronautics Board.

OPINIONS BELOW

The Texas Supreme Court decision in this case, *Texas Aeronautics Commission, et al. v. Braniff Airways, Inc., et al.*, is reported, 454 S.W. 2d 199 (Appendix F). That decision reversed the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, reported at 439 S.W. 2d 699 (Appendix E), and the judgment of the 98th Judicial District Court of Travis County, Texas (Appendix D).

JURISDICTION

The judgment of the Supreme Court of Texas was made final by denial of motion for rehearing on June 17, 1970 (Appendix G), subject to a stay of 120 days pending application for relief to this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The opinions below deal with a variety of questions of administrative law and evidence under the law of Texas that need not concern this Court.

The principal question raised in this petition is whether a state regulatory commission may grant permission to an air carrier not holding a Federal certificate to operate over routes forming an integral part of the national airways

system, without any consideration of the effects of such action on the national airways system.

A related question is whether certification of an intrastate airline by the Texas Aeronautics Commission to serve the four major Texas cities of Dallas, Fort Worth, Houston and San Antonio is an unconstitutional burden on interstate commerce in that it adversely affects carriers licensed to conduct interstate service.

STATEMENT

In all but one respect, this is a routine case arising before a state regulatory commission. A new player wants to enter the game, and the established players seek to keep him out. In this case the newcomer, Air Southwest, applied for permission to operate over the routes Houston-Dallas/Fort Worth, San Antonio-Dallas/Fort Worth, and San Antonio-Houston; petitioners opposed the application. What makes this an important federal case with Constitutional overtones is that the application, the challenges, the hearings, decisions and appeals all took place before a state commission and state courts, and under state criteria, although the routes in question all form part of the federal system and the airlines opposing the application as well as other air carriers (flying over these routes) hold federal certificates to serve them. The state commission in interpreting the relevant Texas statute (Appendix A), refused to consider the impact of its action on the national regulatory system, and ruled only on the public convenience and necessity to Texas.

The order of the Texas Aeronautics Commission in this case was issued without opinion after hearing in which the petitioners participated. The absence of findings of fact to support the order was one of the reasons that the District Court set aside the Commission's order (Appendix D).[1]

The details of the application by Air Southwest and the competing operations of petitioners will be spelled out in the main brief if this petition is granted. For present purposes, it is sufficient to note that Air Southwest applied exclusively to fly routes connecting the three principal airports in Texas, and to duplicate routes served by petitioners and others pursuant to CAB certificates. At the time of the hearing before the Texas Aeronautics Commission, Braniff and Trans-Texas were offering 50 or more nonstop flights daily between Dallas and Houston; petitioners and other CAB certificated carriers were offering 22 nonstop flights daily between Dallas/Fort Worth and San Antonio; and petitioners and other carriers were offering 37 nonstop flights daily between San Antonio and Houston. In addition, ten daily international flights operated by Braniff and many more flights to other parts of the United States touch on more than one of the points covered by the Air Southwest application. Thus, inauguration of service by Air Southwest in accordance with its application could make substantial inroads into petitioners' operations pursuant to their federal authority. Trans-Texas, whose subsidy has been gradually reduced, could well require increased subsidy or be forced to curtail its current operations. Braniff, one of the

[1] The other reasons related to the issue of substantial evidence to support the statutory findings.

smaller trunk carriers whose routes have been strengthened by the CAB in a carefully planned effort to achieve more balance and competition with the major trunk carriers, would well experience a reversal of this trend. None of these points were, however, considered by the state agency or Texas Supreme Court although petitioners consistently raised them. The agency qualified to assess the impact of Air Southwest's entry into these markets and charged by the Congress with establishing a sound national air transport system had no part in the decision of this case. Indeed, its prior and contemporaneous decisions affecting the very area covered by the application were completely ignored.

By the simple expedient of waiving the right to carry mail, respondent Air Southwest avoided consideration of the important national issues inherent in its application. The Texas Aeronautics Commission, and the Supreme Court of Texas in affirming the Commission, decided that these issues were of no consequence, and that this was a case by and for the State of Texas exclusively, on the basis of "what air service is best for Texas." The Texas Aeronautics Commission contended before the State Supreme Court that:

> "The Texas Aeronautics Commission can only add competitive, intrastate service at lower fares to a monopolistic environment, which will *cause* the existing carriers to either improve their service and or reduce their fares. There is substantial evidence to justify the *Commission's policy conclusion* that authorization of Air Southwest's improved service at lower cost to the public is the only road it can take to benefit Texas' air travelers, *regardless* of whether part of the existing

service is 'going begging'." (Application for Writ of Error, p. 41; emphasis in the original.)

The issue is thus raised as to whether a state regulatory commission may take such a view on the basis of geographical accident, when sound analysis makes it clear that its actions may have profound effect on the national air transportation system.

The federal questions sought to be reviewed were raised by petitioners herein in their Original Petition to the 98th Judicial District Court of Travis County, Texas, alleging that the Commission's order violated the Commerce Clause of the United States Constitution and conflicted with the Federal Aviation Act of 1958 (Tr. 27).

The trial court set aside the Commissioner's order on state grounds without deciding the federal questions raised by petitioners (Tr. 39-40; Appendix D).

The federal questions were preserved in the Court of Civil Appeals and the Texas Supreme Court by cross-points asserting that the order violated the Commerce Clause and interfered with the regulatory system established in the Federal Aviation Act (Appellees' General Brief in the Court of Civil Appeals, pp. 177-181; Respondent's General Reply in the Texas Supreme Court, pp. 219-228).

Both the Court of Civil Appeals and the Texas Supreme Court decided the case on state grounds. By reversing the lower courts and reinstating the order of the Texas Aeronautics Commission and by refusing to change that decision in response to motions for rehearing which were devoted

almost entirely to federal issues, the State Supreme Court necessarily ruled adversely to petitioners on the issues now presented to this Court.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not been, but should be, settled by this Court.

I. STATE REGULATION OF CIVIL AVIATION HAS A MAJOR POTENTIAL FOR DISRUPTING THE NATIONAL AIR TRANSPORT SYSTEM.

A. *This case presents the predictable breakdown of the distinction between interstate and intrastate air transportation.*

When the Civil Aeronautics Act was passed in 1938, 52 Stat. 973 operations by intrastate carriers were limited. By and large, short-hauls were the domain of the railroads, and principal long-hauls routes extended across state lines. No state made an effort to deny permission to interstate carriers to operate over intrastate routes, such as New York-Buffalo, Philadelphia-Pittsburgh, San Francisco-Los Angeles or Dallas-Houston. As railroads declined in importance for passenger operations and aviation became more and more efficient, transportation by air between points within the same state has become increasingly important. This segment of the transportation industry had two aspects: (1) to connect the smaller points not served by the major airlines — for example, Utica-Syracuse, Harrisburg-Wilkes-Barre, Gladewater-Lufkin; and (2) to tie the smaller cities in to the major trunk routes — for example points in Pennsylvania to Philadelphia, in Illinois to Chicago, in Texas to Dallas and Houston.

At first intrastate operations were entirely free from economic regulation (as contrasted with safety and technical regulations which at all times were vested in federal agencies). Gradually, state agencies began to be established and to take control over the growing local air traffic. Only recently did such local traffic affect major routes on the national airways systems and thus come into potential conflict with the national regulatory system. In 1967, the Chairman of the Civil Aeronautics Board, Mr. Charles S. Murphy, wrote to the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives:

> "The lack of federal control over intrastate carrier operations by air did not present substantial economic problems until recent years. When the Civil Aeronautics Act was enacted in 1938, and for many years thereafter, operations by intrastate carriers were not extensive; and no State denied interstate carriers permission to operate over intrastate segments. Furthermore, there was little regulatory action by the States. By 1961, however, 18 States had begun to issue certificates of public convenience and necessity for intrastate common carriage by air." *Cong. Rec.*, July 11, 1967, page 18,299.

At present, agencies in at least 29 states[2] have been given authority to approve intrastate air carrier applications. In many cases these applications deal with local-service, small-craft and minor-city operations. But first in California, and now in Texas and elsewhere, the state regulatory commis-

[2] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Kentucky, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wyoming, Texas, New Jersey, Washington, South Dakota.

sions appear to be treading on ground occupied by the Civil Aeronautics Board. The Chairman of the Civil Aeronautics Board clearly anticipated this possibility in the letter quoted above:

> "[I]t seems to us that * * * in most cases [the role of intrastate carriers] will not impinge unduly upon the federally regulated systems; * * * that we should not interfere with intrastate operations merely for the purpose of asserting or extending Federal jurisdiction; [but] that we should be alert to prevent intrastate air carrier operations from impinging unduly upon the federally regulated system * * *."

Although Congress distinguished between the jurisdiction of the Federal Aviation Administration over safety and technical aspects — covering all of the air space of the United States — and the jurisdiction of the Civil Aeronautics Board over interstate air transportation, it recognized that the distinction might be difficult to maintain within a rational framework. Accordingly, section 204(b) of the Federal Aviation Act, 49 U.S.C. § 1324(b), states:

> "The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this Act within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and enforcement of this Act."

So far as petitioners are aware, no utilization has been made of that section in this or other comparable proceedings. In part, apparently, the reason is that a federal agency is

reluctant to subordinate its views to a state body, and state bodies are reluctant to yield any portion of their authority.

Congress also provided the Board with authority to classify air carriers and exempt them from the requirements of the Act if, in its judgment, the carriers' operations were too insubstantial to require federal supervision. Federal Aviation Act § 416, 49 U.S.C. § 1386. This provision also suggests that the lack of clarity between "interstate" and "intrastate" operations could be troublesome, and that the federal agency should be the one to determine the effect of an air carrier's operations on the development of a national air transport system.

The draftsmen of the Texas statute here in question sought to avoid the problem by precluding the commission from asserting jurisdiction over carriers holding federal certificates. (Article 46c-6, Subd. 3, V.A.C.S., Appendix A, pp. A1-3). This case, however, shows, as spelled out in Part II below, that it is possible under Texas law for the commission to do indirectly just what the Texas statute and the federal Act proscribe — to affect by state action the rate structure, the competitive route position, and the overall economic operations of federally certificated carriers.

B. *No Inference Should Be Drawn from the Failure by the CAB to Participate in This Proceeding at the State Commission Level.*

The Texas statute (Appendix A, Subdivision 3 of Article 46c-6, V.A.C.S.) requires all applications for certificates to operate within Texas to be served on the Civil Aeronautics

Board. Such service was made in the present case; the CAB made no response. Respondents sought to infer from the lack of response by the CAB a lack of interest on its part in this proceeding, or, to put it another way, that the CAB considered Houston-Dallas or San Antonio-Dallas to be comparable with Gladewater-Lufkin. Apparently, the Supreme Court of Texas accepted this argument, since it stated, in its only reference to the federal agency:

> "A copy of the Air-Southwest application was served upon the CAB * * * but the CAB has taken no part in the matter."

The inference is erroneous. That was made clear by the most recent past Chairman of the CAB, Mr. John H. Crooker, Jr., who was in office during most of the time covered by this proceeding. Mr. Crooker was so disturbed by the sentence quoted above that he filed, on his own, an amicus curiae brief with the Supreme Court of Texas (Appendix H). Chairman Crooker wrote:

> "[T]he attention of the Court is invited to the rather unhappy dilemma facing the CAB in deciding whether to participate in or ignore a proceeding before any state agency such as the TAC. Aside from the budgetary problems and manpower problems facing the CAB in its consideration of whether or not to participate in any State proceeding, certain other procedural problems are connected with such decision. If the CAB appears before a state agency and presents its views to the agency, this makes the state agency the judicial tribunal and the CAB a party or a witness or both. The CAB is thus present before the state agency, and the decision of that agency becomes even more difficult to overturn on review, even if a Court would have reached a different conclusion had the matter been considered *de novo*.

> "Staying out of a State proceeding, as was done in this case, has the obvious drawback of leaving the impression with a Court that the CAB is not concerned about the possibility that too much competition may adversely affect the financial viability of a certificated carrier (especially a subsidized one). Such matters, of course, might have some adverse effect on the development of the Nation's air transportation system.
>
> * * * * *
>
> "It is respectfully urged that if any Motion for Rehearing is filed, the Court indicate its awareness of the dilemma which confronts the CAB in matters of this sort and further indicate that no inference should be drawn from the failure of the CAB to intervene or participate in any proceeding before the State Agency."

Petitioners do not contend that state agencies should be prohibited from authorizing intrastate air carrier operations. They do contend that such power must be exercised within the confines of the federal regulatory system and may not proceed in disregard of that system.

II. THE PRESENT CASE ILLUSTRATES THE CONSEQUENCES OF DISREGARD BY STATE AGENCIES OF NATIONAL REGULATORY CRITERIA

A. The Routes Considered in the Texas Aeronautics Commission Proceeding Were Important Components of Presently Effective Decisions of the Civil Aeronautics Board, Which Would Be Upset if the Texas Commission's Order Were to Stand.

Section 102 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. § 1302) sets forth the criteria for regu-

lation of civil aviation and the factors to be considered in determining the right to federal certification as follows:

> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation and to improve the relations between, and coordinate transportation by, air carriers;
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(e) The promotion of safety in air commerce; and
>
> "(f) The promotion, encouragement, and development of civil aeronautics."

These criteria have been given specific meaning by the CAB in a series of decisions establishing the route pattern and competitive position of various air carriers. A complete discussion of these criteria would go beyond the scope of the present petition. It is noteworthy, however, that a number of CAB proceedings in recent years have dealt expressly with the issues relevant to this case. For example,

in the *Southwest-Northeast Service Case*, 22 C.A.B. 52 (1955), involving applications by Braniff, Delta and others to operate from Texas points to major centers in the Northeast, the CAB demonstrated its concern for awarding routes in such a manner as to strengthen smaller trunk carriers to insure that they would be able to operate without subsidy during periods of economic adversity. In support of this policy, the Board rejected the hearing examiner's recommendation that Eastern be awarded parallel route authority with American between Dallas/Fort Worth and Washington and New York, and instead awarded that route to Braniff. Similarly, the Board rejected the hearing examiner's recommendation that American be awarded a parallel route authority with Eastern between Houston and Washington and New York, and awarded that route to Delta. The Board made clear that it wished Delta and Braniff to grow in parallel, with each to offer competition to a member of the Big Four (United, TWA, American and Eastern), in the one case American, in the other case Eastern. The consequence of the Texas Aeronautics Commission decision in the present case would be to upset that policy substantially: Braniff would be weakened in its ability to compete with American; and the rough equality between Braniff and Delta as smaller trunk carriers competing with each other and with the Big Four would be upset.

In the *Southwestern Area Local-Service Case*, 37 C.A.B. 469 (1963), a number of carriers, large and small, local and national, applied for nonstop service between Houston and

Dallas in competition with petitioner Braniff. The CAB awarded that route to petitioner Trans-Texas on the grounds that it had a greater stake in the market than any of the other applicants, that its economic interests were centered in the area, and that its selection would furnish Trans-Texas with an opportunity of fulfilling at less cost the local service function for which it was established. As the Board anticipated, Houston-Dallas has become Trans-Texas' most profitable route. Clearly, if the Texas Aeronautics Commission order in this case is upheld, the rationale of the CAB in the *Southwestern Area Local-Service Case*, that award of the Dallas-Houston route would enable Trans-Texas to improve its services between Dallas and points in south Texas, would be destroyed.

Similarly, other components of Trans-Texas' CAB authorization could well be undercut as a result of the Texas Aeronautics Commission's order here. For example, at the very time the Air Southwest proceeding was going through the Texas courts, the CAB awarded Trans-Texas a route between Dallas/Fort Worth and Albuquerque, in part on the theory that this would permit single plane service between Houston and Albuquerque. *Service to Albuquerque Case*, Docket No. 18586 (July 24, 1969). Also, in *Texas International San Antonio-Dallas Subpart M Case*, Docket No. 20066 (November 21, 1969), the CAB removed Trans-Texas' intermediate stop restriction between San Antonio and Dallas/Fort Worth while at the same time refusing to expand American's authority in this market. Again, the

reason was the Board's design to strengthen Trans-Texas and reduce its dependence on subsidy. Finally, the Board acted to protect Trans-Texas' competitive position in the Dallas Fort Worth-Houston market by denying Delta authority to serve that market as an intermediate point between Houston and St. Louis. *Gulf States Midwest Points Service Investigation,* Docket No. 17726 (1968).

B. The Subsidy Policy of the CAB for Local Service Carriers Would Be Thwarted by the Action of the Texas Aeronautics Commission in This Case.

During recent years the subsidy program of the CAB has (with one exception) been directed solely to providing local service to communities not large enough to support major trunkline service. Increasingly, the CAB has taken the view that local service carriers should be given some access to major traffic points such as New York, Chicago, Houston or Dallas to cross-subsidize service to the smaller communities and to reduce their dependence on subsidy. Hall, *The Civil Aeronautics Board Policy Favoring Subsidy Reduction to Local Service Carriers,* 35 J. Air L. & Comm. 59, 68-70 (1969). Petitioner Trans-Texas is a local service carrier presently on subsidy. An important reason for the awards made to Trans-Texas in the cases cited in the preceding section was to increase Trans-Texas' revenue and reduce its dependence on subsidy. For example, in the *Service to Albuquerque Case,* Docket No. 18586 (1969), the Board expressly said that an "equally important reason" for the selection of Trans-Texas was that it would "enable the carrier to achieve a subsidy need reduction of approx-

imately $2.4 million in the first year of operation." It is plain that action by the CAB to reduce Trans-Texas' dependence on subsidy would be frustrated by the Texas Aeronautics Commission's authorization of a new carrier on its most profitable route.

The interplay between the development of adequate air transportation to smaller communities and the federal subsidy policy was recently stated in a speech by Robert T. Murphy, Member, Civil Aeronautics Board, before the Governor's Transportation Conference, Casper, Wyoming, on August 25, 1970:

> "Beginning about the middle sixties, the Board and the industry for various reasons undertook a program aimed at tapering down the annual subsidy payments of the local carriers year by year. From a high of $70 million of subsidy paid to the local service carriers in 1963, we had driven the amounts down until the Board's subsidy request for the present fiscal year was below $30 million. We accompanied this by route proceedings in which we tried to strengthen the local service carriers by awarding them authorizations to operate in larger and longer traffic markets in the hope that the profits there would cross-subsidize service to smaller communities. We allowed them to overfly many smaller traffic points and generally strengthened their route structures. * * * By 1969 the nine remaining local service carriers had a subsidy need of nearly $76 million but we paid them only $36 million under the so-called class rate formulas then in effect. This, of course, left them far short of their revenue requirements and resulted in substantial losses in recent periods. Unfortunately, the brunt of these losses has fallen on the small, low traffic points as the carriers have sought to stem the flow by curtailing or eliminating service to these low traffic and frequently isolated points."

It is, of course, possible that the most efficient allocation of resources would be for reduction in services of the subsidized carrier, Trans-Texas, and inauguration of service by the unsubsidized carrier, Air Southwest. That judgment, based on traffic projections and detailed analysis of comparative efficiencies would have to be made on remand of this case. For present purposes, however, the point is that the questions have not been considered.

In short, the current policy of the CAB with respect to the area covered by the present case is to strengthen the local service carrier Trans-Texas, and to build up the growth of Braniff in parallel with the growth of Delta as a major source of competition to the Big Four. Right or wrong, this policy has been decided on by the federal agency given the assignment of establishing a nationwide air transport system. The Texas Aeronautics Commission has acted in complete disregard of that design at the same time the federal policy was being fashioned. *Gulf-States-Midwest Points Service Investigation*, Docket No. 17726 (1968); *Service to Albuquerque Case*, Docket No. 18586 (1969); *Texas International Airlines, Inc., San Antonio-Dallas Subpart M Case*, Docket No. 20066 (1969). If comparable action were permitted by other state regulatory bodies, the national air transport system would soon be riddled beyond recognition.

C. The Texas Aeronautics Commission Sought to Impose Its Local Views of an Appropriate Rate Structure in Disregard of National Policy.

In its application for writ of error to the Supreme Court of Texas, the Texas Aeronautics Commission made it clear

that a major purpose of the state agency in approving Air Southwest's application was to provide service at lower fares in the expectation of forcing the federally certificated carriers to reduce their fares. Evidently the rate aspect was a primary consideration in the decision of the Supreme Court of Texas as well (Appendix F, p. F9-10). Lower rates sound to the layman like an attractive proposition. The Federal Aviation Act, however, in Section 1002(e) (49 U.S.C. § 1482) lists a number of ceriteria:

> "(1) The effect of such rates upon the movement of traffic;
>
> "(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such services;
>
> "(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
>
> "(4) The inherent advantages of transportation by aircraft; and
>
> "(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

How these criteria are to be applied is the subject of a currently pending proceeding before the CAB in *Domestic Passenger Fare Investigation*, Docket No. 21866 (For an earlier discussion, see *General Passenger Fare Investigation*, 32 C.A.B. 291 (1960), sustained *sub nom Eastern Air Lines v. C.A.B.*, 294 F. 2d 235, (D.C. Cir. 1961)). Whether, for example, fares should be based on distance traveled, on

the number of landings, on relative profitability of different routes; whether there should be a different fare structure where one or more carriers operates under subsidy; whether there should be a uniform definition of investment and a uniform system of accounting and depreciation are all matters of great importance and great complexity. But neither the Texas Aeronautics Commission nor the Texas Supreme Court saw any reason to inquire into any of these issues.

The consequence can be easily foreseen. Suppose, for example, a service San Antonio-Dallas/Fort Worth-New York (e.g. Braniff Flight 6). If petitioner Braniff were required to reduce its San Antonio-Dallas/Fort Worth fare in order to compete with Air Southwest, should the Dallas-New York segment pay a greater burden of the total? Or should some other service, say Chicago-Houston, bear an increased burden in order to enable Braniff to attain a rate of return as prescribed by the CAB? The variations on this question could be multiplied *ad infinitum*. The point is that to disregard them is not only irrational but is disruptive of the regulatory system and a sound economic aviation industry.

III. THE CERTIFICATION OF AN INTRASTATE AIR CARRIER TO SERVE MAJOR AIR TERMINALS IN DIRECT COMPETITION WITH FEDERALLY-CERTIFICATED CARRIERS BURDENS INTERSTATE COMMERCE.

Air transportation, by its very nature, demands application of the principle first announced by this Court in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851),

that states have no power to act in those areas of interstate commerce which by their nature require uniformity of regulation. This Court, not the Texas Aeronautics Commission, is the final arbiter of the national interest under the Commerce Clause. *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945). The state's certification of an airline to serve the important routes here in question, if permitted, would potentially burden interstate commerce in much the same way as the burden condemned by Justice Brandeis in *Colorado v. United States*, 271 U.S. 153, 162-163 (1926):

> "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase in rates."

Air Southwest is caught up in an unending stream of national commerce: it will take off and land at the airports serving national and international flights; its safety standards are prescribed by the Federal Aviation Agency; its passengers will purchase tickets in the same terminal facilities; the travel agents that write tickets for federally-certificated air carriers will write tickets for Air Southwest flights; and Air Southwest claims that its passengers will

be drawn from primary and secondary markets having a combined population in excess of 5,000,000 people (Air Southwest Exhibit No. 23, p. 7).

Over a century ago, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23 (1824), this Court established that control of the navigable waters of the United States was vested in the Congress and the federal government and not the states. As Justice Jackson has observed, there is no reason to suggest that the control of airways is any less a matter of federal concern. In *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1943) he wrote, concurring:

> "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift the navigable waters of the United States out of local control and into the domain of federal control. *Air as an element in which to navigate is even more inevitably federdlized by the commerce clause than is navigable water.* * * *
>
> "*Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive.* Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction by the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the federal government alone, and not to any state government. * * *"

The state has exceeded its constitutional authority by certificating Air Southwest to compete with federally-certificated carriers in major interstate markets. Only this Court may prohibit this erosion to federal authority and prevent this encroachment into the federal domain.

CONCLUSION

No opinion in this Court deals specifically with the scope of state regulatory authority over commercial air transportation.[3] The conflict between state and federal regulation of civil air transportation is steadily growing, and this case presents an ideal opportunity for the Court to establish the appropriate guidelines. The Court is not asked to substitute its judgment either for that of the Texas Aeronautics Commission or for that of the CAB. The Court is asked, rather, to prescribe to the Texas Aeronautics Commission (and by implication to comparable agencies in 28 other states) the limits of its decision making in relation to the federal air transport system. Conversely, the Court is asked, hopefully with the help of the Solicitor General in consultation with the Civil Aeronautics Board, to fashion a procedure whereby state agencies and courts will not be left to guess about the significance of silence on the part of the CAB in a given case, but whereby both the state and federal interests can be adequately presented and rationally judged.

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[3] For cases in which the Supreme Court postponed consideration of this issue, see *Public Utilities Commission v. United Air Lines*, 346 U.S. 402 (1953), reversing *United Air Lines v. California Public Utilities Commission*, 109 F. Supp. 13 (1952); *Western Airlines v. People*, 268 Pac. 2d 723 (1954), appeal dismissed, 348 U.S. 859 (1954). See also, *Civil Aeronautics Board v. Friedkin Aeronautics*, 246 F. 2d 173 (9th Cir., 1957).

For the reasons stated, petitioners pray that this petition for certiorari to the Supreme Court of Texas be granted.

Respectfully submitted,

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APPENDIX A

Acts 1961, 57th Leg. R.S. Ch. 379, p. 850
(Article 46c—6, Vernon's Ann. Rev. Civ. Stat. of Texas)

Art. 46c—6. Commission Powers and Duties

Subdivision 1. General. The Commission, and its Director, acting under its authority, is empowered and directed to encourage, foster, and assist in the development of aeronautics in this state and to encourage, aid and assist in the establishment of airports and airstrips and air navigational facilities in this state, and, as to lands, or portions thereof, or navigational aids or facilities donated or given to the state, or to the Texas Aeronautics Commission to be held by it in trust for the state, the Texas Aeronautics Commission may control, administer, and have jurisdiction thereover, and may lease the same on the terms hereafter provided. The Commission and its Director may cooperate with and assist the United States, municipalities or other governmental subdivisions of this state, or persons engaged in aeronautics, or in the development of aeronautics, and may endeavor to coordinate the aeronautical activities of such others, and, municipalities and governmental subdivisions are authorized to cooperate with the Commission in the development of aeronautics and aeronautical navigational facilities or aids in this state.

Subdivision 2. Authority to Contract. The Commission may enter into contracts which it deems necessary or advisable in conformity with and in the execution of the powers granted it by this Act, as amended.[1] However, except as to moneys received by gift, the Commission shall have no power to enter into any contract or agreement binding on the State of Texas for the payment of any moneys which have not been authorized by appropriation of the Legislature from the general revenues or from the Texas Aeronautics Commission Fund. All contracts entered into by the Commission shall be submitted to the Attorney General for the approval as to form. The Commission shall not enter into any contract binding the State of Texas in excess of the power granted in this Act.

Subdivision 3. Scheduled Intrastate Carriers. For the public convenience and necessity, the Commission is granted the right, power and authority to exercise economic and

safety regulations over only scheduled intrastate carriers not holding certificates of convenience and necessity from the Civil Aeronautics Board under the Federal Aviation Act of 1958, as now or hereafter amended. In this connection the Commission shall promulgate both economic and safety regulations pertaining to such carriers. As to the economic regulations promulgated, the Commission shall take into account the financial responsibility of the carrier, the public convenience and necessity for the proposed service, routes, proposed rates or charges, the effect on existing carriers, and any other factors bearing a relation thereto and pertaining to the public interest and necessity. The Commission shall be vested with a broad discretion in promulgating such regulations, and no intrastate air carrier shall operate within the State of Texas unless and until it has met the standards prescribed, and has been issued a certificate to do so by the Commission, and such certificate shall remain in effect only for the period of time prescribed by the Commission, but shall be subject to revocation, or suspension, with notice, for violation of the Commission's rules or regulations, or the safety rules or regulations prescribed by this Act or by the Commission or by the laws of the United States, or any regulation prescribed by any agency of the United States pursuant to existing laws of the United States, or those hereafter enacted. Such certificate so revoked or suspended may be reinstated upon order of the Texas Aeronautics Commission on its own motion, or after a hearing upon application of the violator, and based on a determination by the Commission that such reinstatement would be in the public interest. Any applicant for an intrastate certificate of public convenience and necessity shall file a signed, verified original and six (6) conformed copies of an application therefor and shall transmit the same by certified mail to the Commission's headquarters, Austin, Travis County, Texas, addressed to the Director. Such application shall set forth any pertinent facts or data required under this Act, or required by the rules, regulations and orders of the Commission. Copies of such application shall be contemporaneously transmitted

to the Civil Aeronautics Board, the Federal Aviation Agency, (or its or their successors), and to any air carrier which is serving, or which has applied for permission to serve, the same, or substantially the same routes. After receipt of such application the Commission shall set a date for hearing which may be conducted by the Commission, or at its direction, by the Director, or any other staff member of the Commission, but the final determination shall be made by the Commission and shall be evidenced by a final written order granting or denying such certificate in whole or in part. Any interested party, affected by the Commission's final order to the state courts shall be entitled to a trial de novo on all facts and circumstances involved in such matter. Nothing in this Act shall apply to or be construed or held to apply to, directly or indirectly, any commercial airline, or employees thereof, operating under the Federal Aviation Act of 1958, as now or hereafter amended,[1] and under current certificates of public convenience and necessity issued by the Civil Aeronautics Board of the United States of America, or any other governmental agency successor thereto, pursuant to the provisions of said Federal Aviation Act of 1958, as now or hereafter amended.

Subdivision 4. Co-operation with the United States. The Commission shall work with the agencies of the United States in enforcing the Statutes, directives, rules and regulations of the United States. It is authorized to report to the appropriate federal agencies and agencies of other states all proceedings instituted charging violations of this Act or of Federal Statutes. It is authorized to receive reports of penalties and other data from agencies of the United States and other states, and when necessary, to enter into agreements, approved by the Attorney General of Texas as to form, with the United States and the agencies of other states governing the delivery, receipt, exchange and use of reports and data. The Commission may make such reports, with or without request therefor, to any officer of the state or of a municipality authorized by the Commission or by the United States to enforce the aeronautics laws, but

such reports shall not constitute evidence of any violation nor shall the same be received as evidence by any court.

Subdivision 5. Aircraft Operation. Aircraft shall be operated in and over the state in a safe manner. Operation shall be deemed safe if conducted in compliance with the United States laws and regulations governing air traffic and aeronautical operation, now in existence or hereafter enacted.

Subdivision 6. Airports and Navigation Aids, Gifts, Leases. To develop aeronautics for the common good, benefit and safety of the citizens of Texas, and to provide for catastrophe, disaster, or state or national emergency, the state, or the Texas Aeronautics Commission on behalf of the state, is granted the right, under its police power, to accept gifts or donations of all or any parts of lands on, adjacent to, or utilizable as, airports or airstrips, or utilizable as a navigational aid, in the judgment of the Texas Aeronautics Commission, from the United States or any agency thereof or from any governmental, municipal, or other political subdivision of this state, or from any other person, firm, association, group, or corporation. The same shall be administered by the Texas Aeronautics Commission and shall be and remain under its control and jurisdiction. The Texas Aeronautics Commission is hereby granted the right to utilize such portion of the Texas Aeronautics Commission Fund, or other moneys appropriated to it by the Legislature, to construct improvements, facilities, or navigational aids thereon as the Commission shall deem advisable or necessary. The Commission is granted the right to rent or lease such lands and improvements to any governmental or municipal agency or subdivision, or to any other person, firm, association, group, or corporation, provided any such lease so executed by the Commission shall be for a term not to exceed twenty (20) years, and provided further, the Texas Aeronautics Commission shall determine, after investigation, and reduce its findings to writing in a book or books to be maintained in the offices of the Texas Aeronautics Commission for that purpose: (1) that the lease is desirable or essential for the pur-

poses above stated; (2) that the lessee is financially responsible; and (3) that the amount of monthly or periodic rental payments shall be sufficient to amortize the amount it has expended thereon for improvements within the term of the lease. Any such lease, before the same shall become effective, shall be submitted to, and approved by, the Attorney General of Texas as to form. Any such lease shall provide that the lessee shall maintain the land, premises and improvements placed thereon by the Texas Aeronautics Commission in accordance with the standards prescribed by the Texas Aeronautics Commission and shall contain a provision that the lease shall immediately terminate and that the lessee shall surrender the premises to the Texas Aeronautics Commission without liability, and without court action, in the event of violation of any of the provisions of the lease, or any rule, regulation or order of the Texas Aeronautics Commission pertaining thereto; and provided further, the Texas Aeronautics Commission shall have the right to utilize the same, or any part thereof, for itself or others, without liability or cost, in time of national or state disaster, emergency, or catastrophe, as determined by either the Governor of Texas or the Texas Aeronautics Commission.

Independently and additionally, the Commission shall be authorized to accept any grant, payment, or gift of moneys, funds or property made to it by any person, individual, firm, association, corporation, municipality, county, or other political subdivision of the state, or from the United States, or any department or agency thereof, as to which the donor has prescribed a particular use for one or more aeronautical purposes. The Commission shall utilize any such grant of property in accordance with the terms of the grant, and as to any such payment, or gift of funds or moneys, the Commission shall (1) deposit the same in any one or more state or national banks approved by the State Depository Board as a depository of the public funds of Texas, and shall (2) utilize such moneys for the purpose or purposes prescribed by the donor. A record shall be maintained in the Commission's offices of such properties and

funds. Such funds shall be expended only upon general or special order of the Commission, and all checks shall be signed by the Director and countersigned by the Chairman of the Commission, or some other Commissioner designated by a majority of the Commission to so countersign. Reports of any such expenditures shall be made at the end of each fiscal year to the Comptroller of Public Accounts of the State of Texas.

Subdivision 7. Investigations, Hearings (General). The Commission shall have the power to conduct and hold investigations, inquiries, and hearings concerning matters covered by the provisions of this Act and rules, regulations and orders of the Commission, unless specifically provided otherwise herein. Hearings shall be open to the public. Each member of the Commission, the Director and every officer or employee of the Commission designated by it to hold an inquiry, investigation or hearing, shall have the power to administer oaths, certify to all official acts, issue subpoenas, and order the attendance and testimony of witnesses and the production of papers, books and documents. Each subpoenaed witness who shall appear at a designated place outside the county of his residence shall receive for his attendance Five Dollars ($5) per day and six cents (6¢) per mile traveled by the nearest practicable route in going to and returning from the place so designated, which shall be ordered paid, on the presentation of proper vouchers, sworn to by such witness and approved by the Commission or Chairman thereof, provided, no witness shall be entitled to any witness fees or mileage who is directly or indirectly interested or involved in the investigation or hearing on account of which he is summoned. Any witness entitled to be paid shall be paid out of any funds so appropriated by the Legislature, or out of the Texas Aeronautics Commission Fund. In the case of the failure of any person to comply with any subpoena or order issued under the authority of this Section, the Commission shall notify the Attorney General of Texas who may bring suit in the name of the state in any district court of Travis County, Texas. The court, if it determines such non-compliance was not

justified shall thereupon order such person to comply with the requirements of the subpoena or order, and failure to obey the order of the court may be punished by the court as a contempt thereof.

Subdivision 8. Education, Publications. The Commission may organize and administer a program of aeronautical education in the schools and colleges of the state and for the general public and may prepare and conduct flight clinics for airmen. The Commission may issue such aeronautical publications as may be required in the public interest.

Subdivision 9. Technical Services. In the interest of public safety and welfare, the Commission may, insofar as is reasonably possible, make available its engineering and technical services, with or without charge, to any municipality or person desiring them in connection with the planning, acquisition, construction, improvement, maintenance or operation of airports, air navigation facilities or other aeronautical activities.

Subdivision 10. When in the discretion of the Commission the public interest will best be served, and the governmental function of the State or its political subdivisions relative to aeronautics will best be discharged, it may grant or loan funds, appropriated to it for that purpose by the Legislature, to any incorporated city, town or village in this State for the establishment, construction, reconstruction, enlargement or repair of airports; airstrips or air navigational facilities. Provided that any such funds must be expended by the city, town or village for the purpose provided herein and in conformity with the laws of this State and with the rules and regulations which the Commission is hereby authorized to promulgate.

Prior to approving any loan or grant under this Act the Commission shall hold a public hearing at which all interested parties shall have an opportunity to be heard. No such loan shall be made without a majority vote of the entire Commission in favor thereof and no such grant shall be made without a two-thirds vote of the entire Commission in

favor thereof. In determining whether or not a grant or loan shall be made, the Commission shall consider the following:

(1) The need for an airport or facility or improvement of existing facility in the locality in the light of existing airports or facilities in the area and in light of the overall needs of the State, and

(2) The financial needs of the community with priority given to areas of greatest need.

(3) Loans shall be made in lieu of grants whenever feasible.

Prior to approving any loan or grant the Commission shall require that:

(1) The airport or facility remain in the control of the political subdivison or politcal subdivisions involved for at least twenty (20) years, and

(2) The political subdivision disclose the source of all funds for the project and its ability to finance and operate the project, and

(3) All loans shall bear interest at the rate of at least three per cent (3%) per annum and have a term of not longer than twenty (20) years, and

(4) At least fifty per cent (50%) of the total project cost be provided from sources other than the State of Texas, and

(5) The project be adequately planned.

Acts 1945, 49th Leg., p. 580, ch. 344, § 6. Amended by Acts 1961, 57th Leg., p. 850, ch. 379, § 4; Acts 1965, 59th Leg., p. 397, ch. 196, § 1, eff. Aug. 30, 1965.

APPENDIX B

Order of the Texas Aeronautics Commission entered February 20, 1968, In the Matter of the Application of Air Southwest Co. for an Intrastate Air Carrier Certificate of Public Convenience and Necessity

STATE OF TEXAS
TEXAS AERONAUTICS COMMISSION
AUSTIN, TEXAS

IN THE MATTER OF
THE APPLICATION OF
AIR SOUTHWEST CO.
FOR AN INTRASTATE
AIR CARRIER CERTIFICATE
OF PUBLIC CONVENIENCE
AND NECESSITY

ORDER

This matter having been heard by the Honorable Charles A. Murphy, Director of the Texas Aeronautics Commission, on January 15-18 and January 22-24, 1968 and the Texas Aeronautics Commission having thoroughly reviewed and considered the Application of Air Southwest Co., the Petitions of the Intervenors, the evidence presented at the hearing and the briefs of the respective parties, and having heard the oral arguments of the respective parties, and having found therefrom that Air Southwest Co. has satisfied all of the statutory requirements and should be granted a Certificate of Public Convenience and Necessity,

It is, therefore, the unanimous ORDER OF THE TEXAS AERONAUTICS COMMISSION that, pursuant to Article 46-1 et seq., Vernon's Civil Statutes, the Application of Air Southwest Co. for a Certificate of Public Convenience and Necessity be, and it hereby is, granted, and the Director of the Texas Aeronautics Commission is hereby directed to prepare and deliver such Certificate of Public Convenience and Necessity to Air Southwest Co., as evidence of its authority to operate, in the form attached hereto as Exhibit A.

Dated this 20th day of February, 1968.

Harry P. Whitworth, Chairman

C-1

STATE OF TEXAS
TEXAS AERONAUTICS COMMISSION
AUSTIN, TEXAS

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

AIR SOUTHWEST CO., doing business as AIR SOUTHWEST is hereby authorized to operate as an intrastate common carrier by air for the transportation of persons and property, utilizing Federal Aviation Agency certficated aircraft of any gross take-off weight and subject to the conditions hereinafter set forth, the laws of the State of Texas and the requirements, rules and regulations of the Texas Aeronautics Commission, issued pursuant thereto, as follows:

Between and among the points Dallas/Fort Worth, Houston and San Antonio, Texas.

The service hereby authorized is subject to the following conditions:

The holder of this Certificate may begin or terminate, and begin and terminate, service at any airports serving those points named herein.

This Certificate shall be effective as of February 20, 1968.

IN WITNESS WHEREOF, The Texas Aeronautics Commission has caused this Certificate to be executed by the Director of the Commission, and the seal of the Commission to be affixed hereto, as of the 20th day of February, 1968.

Signed and Entered this the ..... day of ....., 1968.

.....
Charles A. Murphy, Director

(SEAL)

No. 164,386

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
98TH JUDICIAL DISTRICT

BRANIFF AIRWAYS, INC., ET AL.,
v.
THE TEXAS AERONAUTICS COMMISSION, ET AL.

JUDGMENT

On the 25th day of March, 1968, came on to be heard the above-entitled and numbered cause, wherein BRANIFF AIRWAYS, INC., CONTINENTAL AIRLINES, INC., and TRANS-TEXAS AIRWAYS, INC., are Plaintiffs, and THE TEXAS AERONAUTICS COMMISSION and HARRY P. WHITWORTH, its Chairman, in his official capacity only, and REX C. CAUBLE, HUGH A. FITZSIMONS, JR., WILLIAM N. ALLEN, PAUL M. FULKS, SR., and A. G. THOMPSON, its Members, in their official capacities only, and CHARLES MURPHY, its Director, in his official capacity only, are Defendants, and in which AIR SOUTHWEST CO. is Intervenor-Defendant, and came the parties and announced ready for trial, by agreement, on the issue of whether or not the permanent injunction should be granted; and the Court, having considered the verified Petition of the Plaintiffs, the evidence, and the argument of counsel, and it appearing to the Court that the evidence and the law are with the Plaintiffs; that Plaintiffs are entitled to the relief sought; that there is no evidence and no substantial evidence that AIR SOUTHWEST CO. complied with the statutory requisites for securing a Certificate of Public Convenience and Necessity in that there is no evidence and no substantial evidence that there is a public necessity for the proposed service, no evidence and no substantial evidence that the proposed service would be in the interest of public convenience, no evidence and no substantial evidence that AIR SOUTHWEST CO. possesses such financial responsibility, fitness and ability as would warrant the issuance to it of a Certificate of Public Convenience and Necessity,

no evidence and no substantial evidence that the proposed rates or charges would be adequate for the operation of the proposed service over the proposed routes, no evidence and no substantial evidence that a Certificate of Public Convenience and Necessity could be issued to AIR SOUTHWEST CO. without undue harm to existing carriers, and no evidence and no substantial evidence that AIR SOUTHWEST CO. has complied with the standards for operation which the Commission is required to prescribe; that there is no evidence and no substantial evidence to support the Order of February 20, 1968, by which Defendant, THE TEXAS AERONAUTICS COMMISSION, purported to authorize the issuance of a Certificate of Public Convenience and Necessity to AIR SOUTHWEST CO.; that the February 20, 1968 Order of THE TEXAS AERONAUTICS COMMISSION is void because of the absence of any statement therein of findings basic to such Order; that the Order is void in that it was issued without compliance with the basic requirement of due process that such an order state on its face findings of the facts essential to the exercise of such administrative authority; that the issuance of the Certificate and the exercise of the purported rights granted therein would irreparably harm, injure and damage Plaintiffs through losses of passengers and passenger revenues, and freight and freight revenues, for which losses they have no adequate remedy at law; and that the Temporary Restraining Order heretofore granted herein should be, and the same is hereby perpetuated, and it is accordingly,

ORDERED, ADJUDGED AND DECREED that the February 20, 1968, Order of THE TEXAS AERONAUTICS COMMISSION authorizing the issuance of a Certificate of Public Convenience and Necessity to AIR SOUTHWEST CO. be, and the same is hereby, set aside and held for naught, and that the Defendant, THE TEXAS AERONAUTICS COMMISSION, and the individual Defendants, in their official capacities only, be, and the same are hereby, permanently enjoined from, and that they shall desist from, issuing to AIR SOUTHWEST CO. a Certificate of Public Convenience and Necessity upon the basis of THE TEXAS

AERONAUTICS COMMISSION'S Order of February 20, 1968, hereinabove held to be invalid, set aside, and held for naught.

To all of which Judgment as recited above, the Defendants and Defendant-Intervenor, AIR SOUTHWEST CO., in open court excepted and gave notice of appeal.

SIGNED, AND ORDERED ENTERED OF RECORD, at Austin, Texas, this the 6th day of August, 1968.

/s/ CHARLES O. BETTS
District Judge, Presiding

The TEXAS AERONAUTICS COMMISSION et al., Appellants,

v.

BRANIFF AIRWAYS, INC., et al., Appellees.

No. 11655.

Court of Civil Appeals of Texas. Austin.

March 12, 1969.

Rehearing Denied April 16, 1969.

PHILLIPS, Chief Justice.

In November, 1967, Air Southwest Co. applied to the Texas Aeronautics Commission for a Certificate of Public Convenience and Necessity authorizing Air Southwest to provide scheduled commuter air service between the Texas cities of Dallas/Fort Worth, Houston and San Antonio. Thereafter, Air Southwest filed two amendments to its application setting forth the names of additional directors and shareholders of the Company.

The Commission permitted Braniff Airways, Inc., Continental Airlines and Trans-Texas Airways, Inc., to intervene in opposition to the granting of Air Southwest's application. A seven day hearing, beginning January 15, 1968, was then held before the Director of the Texas Aeronautics Commission. Upon motion of Braniff, Continental and Trans-Texas made orally at the conclusion of the hearing and subsequently submitted in writing, the Commission granted the parties leave to file briefs with the Commission and to argue the case orally before its members.

Each of the parties submitted a brief to the Commission, and, on February 20, 1968, oral argument took place before the Commission members sitting *en banc* in Austin.

The Chairman of the Commission thereafter announced that the six members of the Commission had unanimously determined to award a Certificate of Public Convenience and Necessity to Air Southwest in the form prayed for and requested that an appropriate order and certificate be pre-

pared. Before this could be achieved, however, Braniff, Continental and Trans-Texas filed suit against the Commission, its members and Director in the District Court of Travis County, Texas, praying that the order of the Texas Aeronautics Commission be set aside and seeking the issuance of, respectively, a temporary restraining order, temporary injunction and permanent injunction prohibiting the Commission, its members and Director from issuing a Certificate of Public Convenience and Necessity to Air Southwest. The trial court granted the temporary restraining order.

Subsequently, with the Court's permission, the Commission entered its order with a form of Certificate annexed thereto, but did not actually issue the Certificate. Air Southwest intervened in the appeal as a defendant, and the temporary restraining order was continued in effect by agreement of the parties and upon the condition that the hearing on appeal would commence at an early date.

The hearing began on March 25, 1968 and continued through May 10, 1968. At its conclusion, the court announced its decision to vacate the order of the Commission and to grant a permanent injunction restraining the Commission, its members and Director from issuing a Certificate of Public Convenience and Necessity to Air Southwest.

Judgment in the cause was entered on August 6, 1968, and this appeal by the State of Texas and Air Southwest is from that judgment.

We affirm this judgment.

I.

Appellants are before this Court with seven points of error, however, as we sustain Appellees' first counterpoint, we need not notice these points of error[1] with the exception

[1] "Point of Error I: There is substantial evidence that there is a public necessity for the service proposed by Air Southwest and that the inauguration of such service would be in the interest of the public convenience.

Point of Error II: There is substantial evidence that Air Southwest possesses the financial responsibility, fitness and ability to

of points VI and VII which complain, respectively, of evidence excluded and evidence admitted.

Appellees' first counterpoint is that the trial court correcty set aside the order of the Commission[2] because of the absence of substantial evidence that there is a public necessity for the service proposed by Air Southwest and that the inauguration of such service would be in the public interest.

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warrant the issuance to it of a Certificate of Public Convenience and Necessity and that its proposed rates and charges will be adequate for the operation of its proposed service over its proposed routes.

Point of Error III: There is substantial evidence that a Certificate of Public Convenience and Necessity can be issued to Air Southwest without undue harm to existing air carriers and that the issuance of such certificate and the exercise of rights thereunder by Air Southwest will not irreparably harm the appellees.

Point of Error IV: There is substantial evidence that Air Southwest has complied and will comply, with the standards of operation of the Texas Aeronautics Commission, and there is substantial evidence to support the issuance of the Commission's Order granting a Certificate of Public Convenience and Necessity.

Point of Error V: The Order of the Texas Aeronautics Commission is not void for failure to state findings of fact.

Point of Error VI: The District Court erred by incorrectly excluding admissible evidence during the trial of this cause.

Point of Error VII: The trial court erred in permitting inadmissible evidence to be introduced."

[2] A portion of the judgment of the trial court reads as follows: "that there is no evidence and no substantial evidence that AIR SOUTHWEST CO. complied with the statutory requisites for securing a Certificate of Public Convenience and Necessity in that there is no evidence and no substantial evidence that there is a public necessity for the proposed service, no evidence and no substantial evidence that the proposed service would be in the interest of public convenience, no evidence and no substantial evidence that AIR SOUTHWEST CO. possesses such financial responsibility, fitness and ability as would warrant the issuance to it of a Certificate of Public Convenience and Necessity, no evidence and no substantial evidence that the proposed rates or charges would be adequate for the operation of the proposed service over the proposed routes, no evidence and no substantial evidence that a Certificate of Public Convenience and Necessity could be issued to AIR SOUTHWEST CO. without undue harm to existing carriers, and no evidence and no substantial evidence that AIR SOUTHWEST CO. has complied with the standards for operation which the Commission is required to prescribe."

We sustain this counterpoint.

Air Southwest intends to provide scheduled air service among and between the cities of Dallas/Fort Worth, Houston and San Antonio, Texas. At least initially, it would serve only these cities, utilizing four Electra turbo-jet aircraft purchased from American Airlines and seating 90 passengers each in a single class configuration. These are the same aircraft used by Braniff in these markets, except that Braniff's Electras are configured for both first class and coach seating.

Air Southwest places considerable emphasis on accommodating the "commuter" passenger who wishes to depart from one of the cities that it serves and to return thereto on the same day. It proposes to begin operations with eight flights per day between Dallas and Houston, six flights per day between San Antonio and Dallas/Fort Worth and four flights per day between Houston and San Antonio. As the air passenger market becomes stimulated by the addition of Air Southwest's service and the Company increases its penetration of that market, it intends to add additional flights so that by the end of its first year of operation it will be providing sixteen flights per day between Dallas/Fort Worth and Houston, twelve flights per day between San Antonio and Dallas/Fort Worth and eight flights per day between Houston and San Antonio. These will be its basic weekday schedules which will depart between 7:00 a.m. and 9:00 p.m., with emphasis on flights in the prime commuter hours of 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 7:00 p.m. Additional flights will be added on Friday afternoons, which are historically periods of heavier than normal air travel.

The stage lengths sought to be flown by Air Southwest are 194 statute miles between Houston and San Antonio; 246 statute miles between Dallas/Fort Worth and Houston; and 260 statute miles between San Antonio and Dallas/Fort Worth. The average flying time between these pairs of cities will be 33 minutes on the Houston-San Antonio leg; 46 minutes on the Dallas/Fort Worth-Houston leg; and 46 minutes on the San Antonio-Dallas/Fort Worth leg. Air

Southwest's aircraft in their 90 passenger seating configuration will provide more leg room and seat width than the coach sections of jets competing in the same markets.

The Company seeks to maintain a reservations service operating from a single central location in San Antonio to which all reservation calls, including those placed in Dallas, Fort Worth and Houston, will come directly. These calls will be monitored by an automatic call director which stacks the calls, shows how many are waiting, and would enable Air Southwest to promptly vary the number of reservations personnel in accordance with demand.

It desires to sell tickets through independent travel agents in Texas, who will be paid a 7% commission on each sale, which is 2% higher than the commissions paid by competing airlines. Prepunched IBM tickets will be issued to regular customers. These tickets may simply be presented at the passenger boarding gate, and they do not require that any information be written thereon. At the end of each month, the prepunched tickets, identified by customer code number and destination, are processed through an IBM computer which computes the customer's bill for that month. Moreover, tickets could be purchased at airport counters, at the passenger boarding gate or on the airplane itself in flight. Tickets at the airport counters could be issued by a cash register utilizing two different colors of tape, so that the counter agent need only punch the destination and hand the passenger his ticket, which is cut off the tape by the register in the manner of a ticket for a bus trip. All credit cards, except the universal air travel card, would be honored for the purchase of tickets. Air Southwest could not, and would not, "interline" with any interstate air carriers, which means that it would not sell tickets on such carriers to passengers traveling beyond Houston, Dallas Fort Worth or San Antonio. This is not to say, however, that the Company cannot, or would not, carry such passengers who chose to separately purchase an Air Southwest ticket to travel between its four cities as part of their overall journey, and

its independent travel agents obviously could and would sell separate tickets on Air Southwest and on other carriers covering journeys to Houston, Dallas/Fort Worth or San Antonio and beyond.

Air Southwest would provide curbside check-in facilities for baggage, would accept luggage check-ins at its passenger boarding gates and would permit baggage to be carried aboard its aircraft by the passenger. There would be no weight limitation on the amount of baggage that can accompany each passenger.

Air Southwest would spend $400,000 per year in cash and offer $200,000 worth of tickets by way of exchange for exchange for advertising solely in, and of, the Houston, Dallas/Fort Worth and San Antonio markets. It would also employ a salesman in the cities on its routes and promote recreational travel and tours to its cities and the areas surrounding them.

The Company would charge full fares of $14.95 between Houston-Dallas/Fort Worth and San Antonio-Dallas/Fort Worth and of $12.95 between Houston-San Antonio. It would also offer military standby and children's fares of $8.10 between Houston-Dallas/Fort Worth and San Antonio-Dallas/Fort Worth and of $7.10 between Houston-San Antonio. These fares would be available on all of the Company's flights, at any time of day or night and on any day of the week.

On the San Antonio-Dallas/Fort Worth stage, Air Southwest would nominally compete with three other carriers, American Airlines, Braniff and Trans-Texas. Of these three, only Braniff has unrestricted authority from the Civil Aeronautics Board permitting it to operate a non-stop flight serving solely Dallas/Fort Worth-San Antonio and, in fact, most of its service consists of long haul, through flights originating and/or terminating in other cities in the United States and/or Mexico. Trans-Texas is required to serve an intermediate stop in either direction between Dallas/Fort Worth-San Antonio, and American Airlines' flights in either direction serves Mexico City on each trip.

On the San Antonio-Houston leg, Air Southwest would nominally compete with five other carriers, American Airlines, Braniff, Continental, Eastern Airlines and Trans-Texas. Again, however, of these five, only Braniff and Eastern have unrestricted authority permitting them to serve solely these markets on a non-stop basis, and Eastern does not utilize this authority at all, while Braniff has but one non-stop a day serving only these cities. American Airlines' flights between San Antonio and Houston must also serve California as part of their itinerary, and each of Continental's is required to serve an out of state point as well. Trans-Texas must operate without subsidy on non stop flights between these two cities, and its flights are required to serve points beyond either Houston or San Antonio.

Braniff and Trans-Texas are the only two competing carriers on the Houston-Dallas/Fort Worth stage, and both of them have substantially unrestricted authority. Many of their flights nonetheless, are medium and long haul in nature, serving cities other than those under consideration.

In addition, Air Southwest maintains that it will be subject to the same Federal Aviation Agency rules, regulations, requirements, supervision and inspection as the other major interstate airlines involved herein under Part 121 of the Federal Air Regulations.

Appellants vigorously maintain that there is a need for their proposed service inasmuch as their reservations would all be made through a central office in San Antonio; that their tickets could be purchased quickly and efficiently without waiting at airline counters as they would be prepunched IBM tickets; that these fares would be cheaper than those presently charged by the competing carriers; that they could be purchased at the "gate" or even after boarding their aircraft; that their passengers would take their baggage with them onboard thus doing away, to a considerable degree, with lost baggage.

Appellants contend that in 1967, the latest year for which figures were available, Braniff cancelled 4.44%, or 243, of its flights from Houston to Dallas/Fort Worth and 14.27%, or

780, were more than fifteen minutes late. During the same period, Trans-Texas cancelled 5.15%, or 98, of its flights, and 23.29%, or 443, were more than fifteen minutes late. Coming in the other direction, from Dallas/Fort Worth to Houston, Braniff cancelled 4.28%, or 228, of its flights, and 31.83%, or 1,697, were more than fifteen minutes late. 4.86%, or 91, of Trans-Texas' Dallas/Fort Worth to Houston flights were cancelled and 21.44%, or 401, were more than fifteen minutes late. Overall, the Braniff and Trans-Texas flights in this air corridor were either late, or cancelled, 27.32% of the time during 1967, which means that almost one-third of the time air travelers either did not fly at all or were substantially late in arriving. In December, 1967, for instance, Trans-Texas scheduled 573 flights, of which fully 38 were cancelled and 287 were more than fifteen minutes late, for a record of only 43% arriving and on time.

Appellants further contend that a major cause of the poor on-time performance of the airlines presently serving this triangle is the fact that so many of their flights originate outside of the market area Appellants seek to serve and are subject to delays not occurring in the area itself.

Appellants point out that their advertising would be slanted to encourage flights within the proposed triangle rather than the interstate character of advertising presently used by the interstate carriers with whom they propose to compete.

Appellants then describe the economic factors in the proposed market as having a population in excess of five million people with a total effective buying income of over eleven and one-half million dollars. That between 1960 and 1965 the population in what they designate as their primary market area grew at a rate of 17.36% or more than twice as great as Texas as a whole which was 6.81%. That the Texas Water Development Board predicts that by 1980 the population of the primary markets in question will have expanded to 6,727,084 persons or a 77.44% gain since 1960. That according to the U. S. Department of Commerce, through the year 1975 both the population of Texas and

the total value of goods and services the State produces will grow at a rate seventeen percent greater than the forecast for the nation as a whole.

Appellants presented the market projections of a Mr. C. W. Pope, Sr. of San Antonio, their principal market witness, who testified that the entry of Appellants' services into the proposed triangle would "stimulate" the market so that by 1970 there would be 1,249,415 passengers in the Houston, San Antonio, Dallas/Fort Worth markets rather than 1,012,519 should this proposed service be denied. This would be an increase of 236,896, or roughly 23%.

Mr. Pope put great emphasis on the ability of Appellants to "stimulate" the market through lower fares and the various advantages claimed above. He forecast that after a reasonable time or, after achieving "full market identity" Appellants would carry 60% of the origin and destination passengers between San Antonio and Houston, 50% of such passengers between San Antonio and Dallas/Fort Worth and 37.5% between Dallas/Fort Worth and Houston. This would be a system wide average of 49.1%.

Mr. Pope's forecasts were vigorously challenged by Appellees as having been arrived at by highly unorthodox methods; that he used factors to obtain these results that were patently incorrect, resulting in a forecast that was unrealistic, incorrect and even absurd.

Appellant's then presented evidence of four commuter markets in the United States these being San Francisco-Los Angeles, New York-Boston, New York-Washington and Boston-Washington. Their purpose here was to show that in spite of areas served by the large interstate airlines, there was a need for the commuter services in these areas; that the services were financially successful signifying that they had generated tremendous volumes of additional passengers. In this respect Appellants stressed the highly successful operation of Air California which operates principally between Los Angeles and San Francisco.

It should be pointed out here that this case took some five weeks to try and has a statement of facts numbering nearly three thousand pages. Appellants' market projections brought out principally through Mr. Pope's testimony comprises a substantial part of this record especially when Appellees' cross examination and rebuttal testimony is added thereto.

We have not ignored this testimony, however, we have not stated it in the detail that would be required should we believe it to be decisive. We do not believe it so to be under our view that Appellants have not made their case for public convenience and necessity or to state it more simply, a need for the proposed service. This does not mean that many of the advantages to the traveling public that Appellants assert will come to pass should they be granted a certificate are illusory, however, this Court is bound by the law of *stare decisis* with respect to what the law requires a prospective carrier to prove before it can enter into competition over a given route with presently certified carrriers.

II.

This suit was brought under the provisions of Tex.Rev. Civ.Stat.Ann. Art. 46c-6, which is generally concerned with the powers and duties of the Texas Aeronautics Commission. Subdivision 3 of this article states the necessary requirements for the issuance of a certificate to a carrier as follows:

> "* * * As to the economic regulations promulgated, the Commission shall take into account the financial responsibility of the carrier, the public convenience and necessity for the proposed service, routes, proposed

> rates or charges, the effect on existing carriers, and any other factors bearing a relation thereto and pertaining to the public interest and necessity. * * *"

We agree with both parties hereto that the case is governed by the substantial evidence rule and so hold. Subdivision 3 of Article 46c-6 states, in part:

> "Any interested party, affected by the Commission's final order to the state courts shall be entitled to a trial de novo on all facts and circumstances involved in such matter."

We hold that the trial de novo provisions are to be construed in the light of the holding of the Supreme Court in Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369 (1963) and the cases therein cited.

In this case the public need and the public interest cannot be considered merely as a whole but must be considered upon a route by route basis. Railroad Commission v. Red Arrow Freight Lines, 167 S.W. 2d 249 (Tex. Civ. App. Austin 1943, writ ref'd w. o. m.).

It is clear from the controlling statute itself, that the Legislature intended that the route-by-route interpretation which this Court had placed on the Motor Carrier Act be applied to the Certificates of Public Convenience and Necessity which the Texas Aeronautics Commission was authorized to issue under the Air Carrier Act. Tex. Rev. Civ. Stat. Ann. art. 46c-6, Subdivision 3, requires that the Commission's determination be based, among other things, upon the "routes" which the applicant seeks to serve. The same section[3] further requires that copies of the application be

[3] "Any applicant for an intrastate certificate of public convenience and necessity shall file a signed, verified original and six (6) conformed copies of an application therefor and shall transmit the same by certified mail to the Commission's headquarters, Austin, Travis County, Texas, addressed to the Director. Such application shall set forth any pertinent facts or data required under this Act, or required by the rules, regulations and orders of the Commission. Copies of such application shall be contemporaneously transmitted to the Civil Aeronautics Board, the Federal Aviation Agency

served upon any air carrier serving "the same, or substantially the same, routes." Moreover, the Commission is authorized to grant or deny a Certificate "in whole or in part." Unquestionably, the fact that the Legislature authorized the Commission to grant the Certificate for which application was made "in whole or in part," constituted a requirement that the Commission make a separate determination upon the basis of each route proposed to be served. The phraseology of the Act itself, thus, makes it clear that the Legislature intended and required that the Texas Aeronautics Commission approach its determination on applications for Certificates of Public Convenience and Necessity in the same manner in which the Railroad Commission, following this Court's construction of the statute involved in Red Arrow above.

This would have been the proper approach for the Commission to have followed in arriving at its decision. Railroad Commission v. Jackson, 157 Tex. 32, 299 S.W. 2d 266 (1957).

It is apparent from the evidence that each and every segment which Appellants propose to serve is already being served so adequately that there is no substantial evidence indicating either a need or a convenience for additional service.

The following from Official Airline Guide, Quick Reference Edition, February 1, 1968, entered into evidence, summarizes the 52 daily schedules between Dallas Fort Worth and Houston:

(or its or their successors), and to any air carrier which is serving, or which has applied for permission to serve, the same, or substantially the same routes. After receipt of such application the Commission shall set a date for hearing which may be conducted by the Commission, or at its direction, by the Director, or any other staff member of the Commission, but the final determination shall be made by the Commission and shall be evidenced by a final written order granting or denying such certificate in whole or in part."

Southbound				Northbound			
	Flite Departure				Flite Departure		
Carrier	No.	Time	Equip	Carrier	No.	Time	Equip
BI	151	12:45A	B-727	BI	192	7:00A	B-727
BI	289 [1]	7:05A	B-111	TT	940 [3]	7:25A	DC-9
TT	945 [2]	7:20A	DC-9	BI	62	7:50A	B-720
BI	185	7:45A	B-727	BI	280 [1]	8:30A	B-111
TT	911 [1]	8:10A	DC-9	TT	944 [2]	8:30A	DC-9
TT	941 [2]	8:35A	DC-9	TT	922	9:05A	DC-9
BI	85	9:00A	B-727	BI	126	9:30A	B-727
BI	239	10:10A	L-188	BI	122	10:45A	B-727
TT	943	10:30A	DC-9	BI	58	12:00N	B-707
BI	165	11:40A	B-727	TT	954	12:10P	DC-9
TT	973	12:15P	DC-9	TT	914	12:55P	DC-9
BI	385 [2]	12:40P	L-188	BI	150 [2]	1:30P	B-727
BI	381	1:40P	L-188	BI	152	2:00P	B-727
BI	63	3:00P	B-720	BI	352 [2]	3:20P	L-180
BI	221	4:00P	L-188	BI	242	3:25P	B-111

Southbound				Northbound			
	Flite Departure				Flite Departure		
Carrier	No.	Time	Equip	Carrier	No.	Time	Equip
TT	906	4:35P	DC-9	TT	916	4:00P	DC-9
BI	169	5:15P	B-727	TT	901	4:40P	DC-9
TT	917	5:30P	DC-9	BI	232	4:45P	B-727
BI	125	6:05P	B-727	BI	40	5:00P	B-720
BI	137 [2]	6:50P	B-727	BI	384	5:45P	L-188
TT	949	6:50P	DC-9	TT	946	5:45P	DC-9
TT	919	7:50P	DC-9	BI	164	6:30P	B-727
BI	67	7:55P	B-720	BI	190 [2]	7:45P	B-727
BI	59	9:40P	B-707	TT	948 [2]	8:00P	DC-9
TT	902 [2]	10:25P	DC-9	TT	920	8:55P	DC-9
BI	585	10:45P	L-188	BI	580	11:05P	L-188

[1] Except Sunday

[2] Except Saturday

[3] Except Saturday & Sunday

The following 37 Daily Schedules between Dallas/Fort Worth and San Antonio taken from the same source as the schedule set out above and entered in evidence is as follows:

Southbound Flite Departure				Northbound Flite Departure			
Carrier	No.	Time	Equip	Carrier	No.	Time	Equip
BI	573	12:45A	B-111	BI	114	6:35A	B-727
BI	543	3:35A	B-720	BI	12	7:05A	B-720
BI	193	7:00A	B-727	BI	16	8:30A	B-720
BI	291	8:25A	L-188	BI	392	10:15A	L-188
BI	397	9:20A	L-188	TT	936	10:45A	DC-9
TT	935	10:00A	DC-9	BI	4	10:55A	B-720
BI	51	11:20A	B-320	AA	58	11:10A	B-7F
BI	7	11:50A	B-720	BI	390	11:50A	L-188
TT	927	12:35P	DC-9	BI	376	1:00P	L-188
TT	633	1:25P	C-6	BI	66	1:45P	B-720
BI	57	2:10P	B-720	TT	928	2:45P	DC-9
BI	181	3:05P	B-727	BI	154	3:30P	L-188
BI	273	5:40P	B-111	BI	6	4:00P	B-720
BI	183	6:00P	B-727	BI	182	5:10P	B-727
TT	639	6:40P	C-6	BI	50	6:45P	B-320
BI	3	7:20P	B-720	BI	298	9:55P	B-111
BI	153	8:00P	B-727	BI	542	11:30P	B-727
AA	25	9:15P	B-7F	TT	912	11:40P	DC-9
BI	5	9:40P	B-720				

[1] Except Saturday

The following 37 Daily Schedules between Houston and San Antonio is taken from the same source as the two schedules set out above and was entered into evidence:

Westbound				*Eastbound*			
	Flite Departure				*Flite Departture*		
Carrier	*No.*	*Time*	*Equip*	*Carrier*	*No.*	*Time*	*Equip*
CO	55	12:40A	B-2F	AA	162	12:10A	B-7F
EA	447	5:21A	B-720	CO	56	3:50A	B-2F
CO	51	7:00A	B-2F	AA	350	6:00 A	B-2F
AA	163	7:50A	B-7F	CO	54	6:05A	B-2F
CO	65	8:25A	B-2F	BI	142	7:00A	B-727
TT	936	9:45A	DC-9	EA	50	7:15A	B-720
CO	153	10:30A	DC-9	BI	194	11:00A	B-727
BI	239	11:30A	L-188	TT	935	11:38A	DC-9
EA	51	11:47A	B-727	CO	152	1:24P	DC-9
CO	105	12:15P	DC-9	CO	126	1:55P	DC-9
EA	69	12:58P	B-727	CO	52	2:15P	B-2F
CO	157	3:10P	DC-9	AA	146	2:40P	B-2F
CO	67	4:00P	B-2F	EA	126/268	4:45P	B-727
AA	143	4:25P	B-2F	CO	147	6:29P	DC-9
AA	359	5:40P	B-2F	TT	478	7:50P	C-2
CO	159	7:00P	DC-9	CO	158	9:45P	DC-9
BI	145	8:35P	B-727	EA	450	10:55P	B-727
TT	912	10:40P	DC-9	CO	122	11:12P	DC-9
				CO	66	11:45P	B-2F

[1] Except Saturday

One of the Appellants' arguments pertaining to convenience and necessity was inadequacy of present service during "rush hours" or during the most heavy periods of the day. The following is a schedule of "rush hour" schedules, entered into evidence showing the proposed service of Appellants.

"HOUSTON—DALLAS
'Rush Hour' Schedule.

Northbound Houston to Dallas	Southbound Dallas to Houston
Morning	Morning
7:00 Braniff jet	7:05 Braniff jet
7:25 T.T.A. jet	7:20 T.T.A. jet
7:00 Braniff jet	7:45 Braniff jet
8:00 Air Southwest Electra*	8:00 Air Southwest Electra*
8:30 T.T.A. jet	8:10 T.T.A. jet
8:30 Braniff jet	8:35 T.T.A. jet
9:05 T.T.A. jet	9:00 Braniff jet
9:30 Braniff jet	9:45 Air Southwest Electra*
9:45 Air Southwest Electra*	10:10 Braniff Electra
10:45 Braniff jet	10:30 Air Southwest Electra*

* Proposed

Northbound Houston to Dallas	Southbound Dallas to Houston
Afternoon	Afternoon
1:30 Braniff jet	1:45 Braniff Electra
2:00 Braniff jet	2:50 Braniff jet
3:45 Braniff jet	4:00 Braniff Electra
4:00 T.T.A. jet	4:30 Air Southwest Electra*
4:30 Air Southwest Electra*	4:35 T.T.A. jet
4:40 T.T.A. jet	5:15 Braniff jet
4:45 Braniff jet	5:30 T.T.A. jet
5:00 Braniff jet	6:00 Air Southwest Electra*
5:45 Braniff jet	6:05 Braniff jet
5:54 T.T.A. jet	6:50 Braniff jet
6:00 Air Southwest Electra*	6:50 T.T.A. jet
6:30 Braniff jet	7:50 T.T.A. jet
7:45 Braniff jet	7:55 Braniff jet
8:00 T.T.A. jet	

* Proposed

In addition to the extensive flight schedules set out above, the majority of these flights arrive and depart with a goodly percentage of their seats unsold and empty.

There are 4,352 available daily seats in the Houston-Dallas market. In January, 1968 Trans-Texas had an average of 671 empty seats per day between Houston and Dallas, and, during the same month, there was a daily average of 1301 empty seats on the Braniff flights between Houston and Dallas. This included an average of 227 daily empty seats for Braniff between 7 a.m. and 9 a.m. "rush" hours and 277 daily empty seats during the afternoon "rush" hours between 4 p.m. and 7 p.m.

The existing carriers provide 22 non-stop flights daily between Dallas Fort Worth and San Antonio. Braniff had a daily average of 1098 empty seats between Dallas and San Antonio during January, 1968, and an average of 205 empty seats during the morning rush hours between 7 a.m. and 9 a.m. and an average of 125 daily empty seats during the afternoon "rush hours." The daily empty Braniff seats are equivalent to 17 empty twin-engine jets.

There are 37 daily flights between Houston and San Antonio. Braniff, which serves this market together with Trans-Texas Continental Eastern and American, was able to fill only 30.1 percent of its seats during January, 1968 with an average of over 241 empty seats daily. Continental's highest load factor on an eastbound flight occurred in January, 1967 and on that flight the load factor was only 42.8% leaving the plane considerably less than one half full.

Thus it is apparent that Appellants' argument concerning public convenience and necessity is not based upon facts as they existed at the time the Commission entered the order, or as they exist as present but is based in the main upon projections into the future. Their evidence as to the alleged inconveniences inflicted upon the public by the Appellee carriers is evidence as to present conditions and will be dealt with later in this opinion.

It is well established that in any appeal under the substantial evidence rule, the courts must consider the situation as it existed at the time the administrative agency entered the order in question. Magnolia Petroleum Company v. New Process Production Company, 129 Tex. 617, 104 S.W. 2d 1106 (1937); Railroad Commission v. Shell Oil Company, 139 Tex. 66, 161 S.W. 2d 1022 (1942); Blair v. Board of Trustees, Trinity Independent School District, 161 S.W. 2d 1030 (Tex. Civ. App. Galveston 1942, no writ); and Southern Canal Company v. State Board of Water Engineers, 159 Tex. 227, 318 S.W. 2d 619 (1958).

Adequacy of existing service in transportation cases requires the denial of application for new service. The Supreme Court in Railroad Commission v. Jackson, 157 Tex. 32, 299 S.W. 2d 266 (1957), explained that (299 S.W. 2d 268-269):

> "The theory underlying the statutes applicable to motor carriers is that the public interest is better served by regulated rather than by excessive or destructive competition and in determining the issue of public convenience and necessity requisite to the creation of a 'new service' consideration must be given to the competitive effect upon presently operating carriers in the area and their continued ability to render effective public service. Texas & Pacific Ry. Co. v. Railroad Commission, Tex. Civ. App., 138 S.W. 2d 927, reversed on other grounds, 138 Tex. 148, 157 S.W. 2d 622, cited with approval in Steele v. General Mills, 329 U.S. 433, 67 S. Ct. 439, 91 L. Ed. 402; Texas Motor Coaches v. Railroad Commission, Tex. Civ. App., 41 S.W. 2d 1074; Id., Tex. Civ. App., 59 S.W. 2d 923, affirmed 123 Tex. 517, 73 S.W. 2d 511. As bearing upon this issue, the record discloses that there are now six through carriers operating between Amarillo and Lubbock."

This holding applies here where five carriers are already serving the Houston-San Antonio route which Air Southwest seeks to serve; three carriers are already serving the Dallas-San Antonio route which Air Southwest seeks to serve; and two carriers are providing abundant service in vigorous com-

petition on the Dallas-Houston segment which Air Southwest seeks to serve. Because of a showing of adequacy of existing service, the Supreme Court in Miller v. Railroad Commission, 363 S.W. 2d 244 (Tex. 1963), held that there was no substantial evidence to support an order granting a Certificate of Public Convenience and Necessity. That portion of the opinion reads in part (363 S.W. 2d 246-247):

> "We hold also that the order granting the certificate is invalid for lack of support by substantial evidence.
> * * *
>
> The evidence adduced by petitioners established, prima facie, that the services and facilities of the existing specialized motor carriers for transporting roadway construction materials were adequate and that there was no public necessity for the proposed service."

Also applicable is the decision in Railroad Commission v. National Transport Corporation, 363 S.W. 2d 360 (Tex. Civ. App. Austin 1963, writ ref'd n.r.e.). In affirming the judgment of the trial court there setting aside the certificate which the Commission had ordered, this Court wrote (363 S.W. 2d 364):

> "Existing carriers are entitled to transport all of the traffic in the area of their authority as long as they can do so in a reasonably adequate manner, and until it be shown by substantial evidence that the existing carriers cannot adequately handle the traffic, there is no basis upon which new and competing operating rights can be granted."

And further in this same opinion, this Court said:

> "The Trial Court did not usurp the functions of the Commission, but did upon the basis of the testimony find that the action of the Commission in granting the orders was not supported by substantial evidence, and we believe properly so.
>
> Robertson Transports, Inc., et al. v. Transport Co. of Texas et al., Tex. Civ. App., 269 S.W. 2d 472, err. ref. n.r.e."

Appellants presented seven witnesses who testified in their behalf. Of the seven, four were from San Antonio. The first witness from San Antonio was the Executive Vice President of San Antonio's fair, Hemisfair; the second was a lawyer who is President of the Airline Passengers Association; the third was the Executive Director of the Alamo Area Council of Government; the fourth was the immediate past President of the San Antonio Chamber of Commerce. The remaining three were a State Senator and a teacher by profession, an investment banker and the President of a travel agency. Without going into detail with respect to this testimony, suffice to say that, while the tenor of the testimony was to the effect that present service is inadequate, these witnesses' assertions were too vague and general to formulate evidence of a nature substantial enough to cast any doubt whatsoever on the adequacy of service presented through the testimony of the appellees.

Nor does the evidence presented by Appellants purpose a superior service to that presently offered by Appellees. With respect to on-time performance, there is no reason to believe that their service will be immune from bad weather, crowded airport facilities or mechanical breakdowns. Obviously, with only four aircrafts that are used to begin with, any break down of one unit would seriously disjoint their entire schedule. With respect to the advantages of Appellants' proposed simplified ticketing, Trans-Texas has for several years had available an IBM ticket obviously similar to the type proposed to be used by Air Southwest. The ticket is prepared and has the customer's name and account number on it. It is prepunched for billing purposes. The passenger can carry tickets in his pocket like a checkbook and, when he is ready to go somewhere, he can write his origin and destination on the ticket, make his reservation, enter his flight number and sign the ticket. All the passenger needs to do is to hand over the ticket and go to his airplane. For some reason, however, the testimony indicates that the public has not accepted this type of ticketing.

Trans-Texas also has another type of fast-draw ticket for credit card use. The ticket was designed to be used to

expedite general travel and also to serve in emergency-type situations when a passenger might arrive at the last minute when the flight was ready to leave.

Braniff also has the fast-pack ticket. Any person can apply for credit and get fast-pack tickets from Braniff so that he can prepare his own. All the passenger needs to do is to make his reservation. He does not need to check in at the ticket counter but can go directly to the flight gate.

Appellants' description of the inconvenience of persons standing in long lines waiting to buy tickets is not convincing. In serving the Houston and Dallas market, the largest which Air Southwest proposes to serve, Trans-Texas maintains a separate ticket counter in Houston for its Dallas passengers so that they can purchase their tickets without any delay at all in waiting for others to buy more complicated tickets to more distant points. Tickets for Houston are sold in Dallas at the flight gate so that passengers do not even need to go to the main ticket counter to purchase their tickets for Houston.

Although Air Southwest has taken the position that its lower base fares will stimulate travel and encourage vacationing in Texas, it does not propose to offer either a confirmed youth fare or a family plan. The existing carriers all offer family fares which would provide progressively lower total fares as the number of members of the traveling family increased. Trans-Texas also offers a group fare which is available any time serveral persons are traveling together.

Furthermore, fares are subject to regulation and if it is in the public interest to lower them then they should be lowered. By adding service to already existing service, part of which is going begging, is not the answer. While "Public Convenience and Necessity" has not been construed by the Texas courts with respect to Tex. Rev. Civ. Stat. Ann. art. 46c-6(3) we see no reason why air travel should not be regulated under much the same standards and rules applicable to highway travel under the same phrase in the Motor Carrier Act, Tex. Rev. Civ. Stat. Ann. art. 911(a).

Appellants go somewhat further than this and contend that "public need" as used in the Savings and Loan Act[4] and "public necessity" as used in the banking code[5] present much the same sort of "need" as "Public Convenience and Necessity" under the Motor Carrier Act. Then, we are cited to banking and savings and loan cases,[6] which for the most part, are used to buttress Appellants' arguments. Taking its cue from these cases, Appellants have presented their elaborate projections of what air travel will be in the future. Whatever may be the relevance of the banking and savings and loan cases here, in the cases cited the evidence overwhelmingly disclosed *presently* expanding markets coupled with projections indicating continued expansion. Consequently, in these cases the courts have either affirmed charters granted or reversed the Banking Board or the Savings and Loan Commissioner where charters were denied. In addition, where charters were granted, the evidence in these cases disclosed that the banks or savings and loan companies protesting the new charters had vastly *increased* their own deposits thus indicating that competition was needed in order to deter monopolies. State Banking Board v. Airline National Bank, 398 S.W. 2d 805 (Tex. Civ. App. Austin 1966, no writ). The evidence in these cases is certainly incompatible with the "empty seat" evidence presently by the protestants here.

We hold that in considering this record as a whole there is no substantial evidence existing at the time of the entry of the order to uphold the order of the Commission as to the need for the additional service. Consequently, there is no public convenience and necessity for the proposed service under the act. Since such finding must be in the affirmative to uphold the order under the act, the order must fall. Art. 46c-6(3); Gibralter Savings & Loan Association v. Falkner, 371 S.W. 2d 548 (Tex. 1963).

[4] Article 852a, Sec. 2.08(3) V.A.C.S.

[5] Article 342-305, V.A.C.S.

[6] Principally: Gerst v. Nixon, 411 S.W. 2d 350 (Tex. 1966); Chimney Rock National Bank of Houston v. State Banking Board, 376 S.W. 2d 595 (Tex. Civ. App. Austin 1964); Gerst v. Houston First Savings Association, 422 S.W. 2d 514 (Tex. Civ. App. Austin 1967, no writ); Phillips v. Brazosport Savings & Loan Ass'n, 366 S.W. 2d 929 (Tex. 1963).

Appellants' point of error number VI is that of the court in incorrectly excluding admissible evidence during the trial of this cause.

We overrule this point.

The evidence excluded was a public opinion survey conducted by three women either by telephone or person to person interviews. The purpose of the poll was to ascertain whether those interviewed saw a real need for the proposed service, whether they would find it more convenient and whether, should it be put into operation, they would fly more frequently. Due to the position we have taken on this case it becomes unnecessary for us to decide on the admissibility of public opinion polls.

Appellants' point of error number VII is that of the trial court in permitting inadmissible evidence to be introduced.

We overrule this point.

The court permitted appellees, over objection, to admit into evidence a want ad from the Dallas Morning news, wherein Appellants were purportedly seeking airline reservations help in a "Type 40" category at $485 plus. Appellants contend that the ad in question does not state the airline involved, the type of job to be performed, the place where the position is to be filled, etc. Consequently, it is hearsay testimony. We hold that if the admission was erroneous it was harmless error under Tex. R. Civ. P. 434.

Appellees have a cross point to the effect that the trial court erred in failing to hold that the granting of the Certificate of Public Convenience and Necessity sought by Air Southwest and operation thereunder would be unconstitutional as a burden on interstate commerce and in conflict with federal law.

Due to the disposition we have made of this case, further dissertation would be useless.

We affirm the judgment of the trial court.

Affirmed.

O'QUINN, Justice (dissenting).

In my opinion there is in the record substantial evidence to support the decision of the Texas Aeronautics Commission to award a certificate of public convenience and necessity to Air Southwest for the operation proposed in its application.

Traditionally the literature of dissent enjoys greater freedom, less restraint, than the cautious pronouncements of the majority. But this is a license that in this case need not be indulged. My purpose is to state briefly my most impelling reasons for dissenting. No attempt will be made to marshall all the evidence composing substantial support for the order of the Commission.

The record in this case, as pointed out by the majority, embraces nearly 3,000 pages of testimony adduced at a trial lasting more than a month. A substantial part of the record consists of studies and market projections offered by the applicant through C. W. Pope, Sr., who qualified as an expert, together with the cross examination and rebuttal testimony resulting from this evidence.

The Commission heard and obviously believed the testimony of Pope. The Commission heard the challenges of the protesting airlines claiming that Pope's forecasts had been arrived at by highly unorthodox methods, that he used patently incorrect factors to obtain these results, and that the forecast was unrealistic, incorrect, and even absurd. It is evident that the Commission concluded that the attacks were not a complete answer to the testimony of Pope, and that the Commission accepted as a basis for its decision the showing made by Air Southwest through the testimony of Pope.

The fact that testimony is rebutted and contradicted does not destroy it or remove it from the record. Nor does such conflict cause the testimony to be less substantial, in support of the Commission's decision, if the Commission in the exercise of its discretion believes and accepts the evidence.

A case was made out, in my opinion, to show the need in Texas for an airline commuter service to operate initially connecting the three most populous areas of the State. In several significant phases this proposed service was shown to differ essentially from the service offered by existing airlines and to be a service for which there is a public need and one in the public interest.

The Commission, with the evidence before it found in the record, could find the public interest and need in a service providing (1) flight schedules uniquely flexible to fit the changing needs of a commuting public; (2) transportation of baggage without commingling with the abundance of baggage belonging to passengers traveling to and from other states and to and from Mexico and Canada; (3) speedy, streamlined reservation procedures peculiarly adaptable to commuter service, with one central control for all cities served; (4) greatly simplified ticket handling designed for this type of service; (5) lower fares; and (6) greater reliability for promptness and non-cancellation of scheduled flights.

It was contended by the protesting airlines that the high percentage of delays and cancellations of their flights were accounted for in part by weather conditions and congestion over airports, and that the same adversities would confront Air Southwest. The Commission in considering these factors no doubt recognized that Air Southwest would be delayed by airport congestion at only three sites, all located in Texas, and by weather conditions existing only in this State. The protesting airlines are affected by weather and airport congestion, not only in Texas but at all cities and in all states from which their flights are made approaching Texas. Their problems of meeting schedules and avoiding cancellation of flights are multiplied by the number of cities and states they serve in flying to this State.

The Commission had before it substantial evidence that no existing airline would be unduly harmed by the commuter service proposed by Air Southwest. A showing that Air Southwest would provide competition and as a result some

of the existing services would suffer some loss in revenues is not a showing of undue harm. All of the protesting airlines affected by the application serve extended areas out of this State as well as within it. The proposed commuter routes would be only partially competitive with these lines. Continental Airlines conceded it would not be unduly harmed. Both Braniff and Trans-Texas were shown to be healthy, growing airlines. Their claims of harmful diversion of revenues if thrown into competition with Air Southwest do not stand up under close scrutiny. The fallacies and discrepancies of these claims are pointed out in detail by the Attorney General and counsel for Air Southwest in their brief. The Commission correctly decided against the claims of undue harm.

The service proposed by Air Southwest and approved by the Commission for inauguration in Texas is more than a mere partial duplication of existing services. As pointed out by the Attorney General, Air Southwest proposes "* * * instead * * * [to] furnish a unique service which is precisely tailored to * * * convenience and necessity" of the people of Texas.

It is my view that the judgment of the district court should be reversed, and that judgment should be rendered by this Court setting aside the trial court's vacation of the order of the Commission and dissolving the injunction by which the Commission was restrained from issuing a certificate.

THE TEXAS AERONAUTICS COMMISSION et al., Petitioners,

v.

BRANIFF AIRWAYS, INC. et al., Respondents.

No. B-1552.

Supreme Court of Texas.

May 13, 1970.

Rehearing Denied June 17, 1970.

REAVLEY, Justice.

The Texas Aeronautics Commission on February 20, 1968, approved the issuance of a certificate of public convenience and necessity authorizing Air Southwest Co. to provide intrastate air service between Dallas/Ft. Worth, Houston and San Antonio. Braniff Airways, Inc., Continental Airlines, Inc., and Trans-Texas Airways, Inc. initiated this action in the Travis County District Court to stop issuance of the certificate by the Commission. Air Southwest intervened on the side of the Commission. Following a seven weeks trial, that court sustained all of the contentions of Braniff et al., set aside the order of the Commission and enjoined it from issuing a certificate to Air Southwest. The court of civil appeals affirmed the judgment of the trial court. 439 S.W. 2d 699. The Texas Aeronautics Commission and Air Southwest Co. are petitioners here.

By its application to the Commission, Air Southwest proposes to operate four Lockheed Electra aircraft between the three named airports and, initially, to schedule eight flights per day between Dallas/Ft. Worth and Houston, four flights per day between Houston and San Antonio, and six flights per day between San Antonio and Dallas/Ft. Worth. These flights are to be scheduled on weekdays during the hours between 7 a.m. and 7 p.m., with as many departures as possible between 7 and 9 a.m. and between 4 and 7 p.m. The three routes to be served by Air Southwest are cur-

rently served by the following airlines, all holding certificates from the Civil Aeronautics Board acting under the Federal Aviation Act: Dallas/Ft. Worth-Houston by Braniff and Trans-Texas; Dallas/Ft. Worth-San Antonio by American Airlines, Braniff and Trans-Texas; and Houston-San Antonio by American Airlines, Eastern Airlines, Braniff, Continental and Trans-Texas.

In all matters of flying safety, such as the air worthiness of the aircraft and the skill of its operators, Air Southwest would be regulated by the Federal Aviation Agency. All Air Southwest aircraft and pilots would have federal certificates. However, by flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Air Southwest will not require a certificate from the federal agency in charge of economic regulations, the Civil Aeronautics Board. Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law. 49 U.S.C.A. § 1301(3) and (10), and § 1371; Western Air Lines, Inc. v. California, 42 Cal. 2d 621, 268 P. 2d 723 (1954), cert. denied, 348 U.S. 859, 75 S. Ct. 87, 99 L. Ed. 677; *see* Island Airlines, Inc. v. C. A. B., 331 F. 2d 207 (9th Cir. 1964); Island Airlines, Inc. v. C. A. B., 363 F. 2d 120 (9th Cir. 1966); Comment, 47 Texas L. Rev. 275 (1969). A copy of the Air Southwest application was served upon the CAB, as required by the rules of the Texas Aeronautics Commission, but the CAB has taken no part in the matter.

SUBSTANTIAL EVIDENCE REVIEW

The Commission has acted under the Authority of Art. 46c-6, sub. 3, Vernon's Anno. Texas Civil Statutes, which has since 1961 provided,[1] in part:

> "As to the economic regulations promulgated, the Commission shall take into account the financial re-

[1] This statute was significantly amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969. The amendment expressly provides: "Nothing in this Act affects any litigation pending on the effective date of this Act."

> sponsibility of the carrier, the public convenience and necessity for the proposed service, routes, proposed rates or charges, the effect on existing carriers, and any other factors bearing a relation thereto and pertaining to the public interest and necessity."

The statute further provides that after final determination by the Commission any interested party may appeal to the state court and "shall be entitled to a trial de novo on all facts and circumstances involved in such matter." In accordance with long precedent, the words of the statute are taken to provide for the usual judicial review of administrative orders by which it is the court's responsibility to determine if that order is reasonably supported by substantial evidence. Fire Department of City of Fort Worth v. City of Fort Worth, 147 Tex. 505, 217 S.W. 2d 664 (1949).

The CAB carriers (Braniff, Trans-Texas and Continental) contend that the court need only examine the present services afforded by them to these cities and, upon finding those services to be adequate, conclude the case in their favor. They argue that there is no need to look at the effect the proposed service by Air Southwest would have upon passenger traffic or upon the state. The court of civil appeals based its decision on the proposition that it was "bound by the law of *stare decisis* with respect to what the law requires a prospective carrier to prove before it can enter into competition over a given route with presently certified carriers."

The statute governing the regulation of air carriers does not specifically require the Aeronautics Commission to determine that existing services are inadequate prior to the granting of a new certificate. This is the statutory duty of the Railroad Commission prior to its issuance of a certificate for a motor carrier. Art 911b, § 5a(d), V.A.C.S. From the beginning of the legislative declarations with respect to the licensing of motor carriers, the Railroad Commission has been directed to conserve the highways of the state by not burdening them with more trucks and busses than are necessary. Bailey, Motor Trucks Certificates and Permits in Texas, 20 Texas L. Rev. 165 (1941).

Whether named in the statute or not, adequacy of existing service is always an important consideration in determining public need for additional service. *See* Benson v. San Antonio Savings Association, 374 S.W. 2d 423, 427 (Tex. Sup. 1963). However, in this context "adequacy" should not be taken to denote bare sufficiency. The existing air service, for example, could be inadequate even though anyone with the fare is presently able to obtain passage. If it can be said that the public need does not ordinarily require a new service where existing service is adequate, it can also be said that the public need would ordinarily require that new service which will substantially improve existing service.

The decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission. The courts may not make this decision for the Commission, nor may we set ourselves to analyze the Air Southwest market projections in order to decide for its investors the profitability of their venture. The Commission has decided the disputed contentions as to the public interest in favor of Air Southwest; we may interfere with that decision only if there is no reasonable support for it in the judicial record.

After studying this lengthy record with the extensive presentation made by each side, we cannot say that a decision either to grant or deny the application would be unsupported by substantial evidence. We will summarize the reasonable support we find here for the Commission's order.

POOR PERFORMANCE BY EXISTING CARRIERS

We have the CAB records of the time performance of all flights scheduled on two of these routes in 1967. The record is not a good one.

On the Dallas/Ft. Worth-Houston route in 1967 Braniff canceled 471 flights and arrived late by CAB standard (at

least 15 minutes behind schedule) on 2,477 flights. In the same year Trans-Texas canceled 189 flights and arrived late with 844 flights. Of all the flights by these two existing carriers, 27.32% were either late or canceled. In the month of December, 1967, Trans-Texas arrived on time with only 43% of its flights.

On the Dallas/Ft. Worth-San Antonio route Braniff has an effective monopoly. Trans-Texas cannot fly non-stop between these cities. American can do so only as the leg of a flight to Mexico, and it has only one flight each way daily. On this route in 1967 Braniff canceled 202 flights and was late on 1,748 occasions. Of all scheduled flights, 28.26% were either late or canceled.

It is significant that these late arrivals were much more common on the southbound flights than on the northbound flights. Braniff flights from Dallas/Ft. Worth to San Antonio were late on 31.78% of the trips as compared with 18.45% late flights in the other direction. From Dallas/Ft. Worth to Houston 31.83% of Braniff flights were late, while only 14.27% of the northbound Braniff flights were late. The Braniff southbound flights usually originate in distant cities such as Denver, Chicago, Kansas City, or New York and are subject to weather and traffic delays in those areas. Air Southwest insists that it can assure better schedule compliance by being subject only to Texas weather problems and by being free of the problems of other areas. The 1967 performance record of existing carriers supports that contention.

The schedule of existing flights, particularly those flying south from Dallas non-stop to San Antonio, leaves something to be desired. The first daylight flight in the morning leaves Dallas at 8:25 a.m. and the next one is at 11:20 a.m. Only one flight non-stop goes south between 4 p.m. and 7 p.m.

We do not have in this record the information on the arrival performance of the flights between Houston and San Antonio. It does show that available schedules are poor. Though five carriers have authority from the CAB

to fly this route, their schedules are made to fit long hauls either to the east or west coast. In 1965 Continental carried 62.47% of the passengers on this route, and Eastern carried another 27.82%. Braniff and Trans-Texas each had two flights going in each direction at the time of the commission hearing. The CAB carriers point out that they have 37 daily flights on this route. The problem is the timing of those flights to meet the needs of the people commuting between these two cities. For example, between midnight and 7:15 a.m., a person has the choice of six flights from San Antonio to Houston, but if he does not make the Eastern flight No. 50 which leaves at 7:15 a.m. he must wait until the Braniff flight No. 194 departs at 11 a.m.

Braniff and Trans-Texas give the number of empty seats on their flights as proof that existing flights offer more space than the traffic needs. The majority opinion of the court of civil appeals accepts this evidence as forceful proof of the adequacy of existing service. But we should expect empty seats on most airline flights. Air passengers cannot be compared with surface passengers or freight in this respect. To travel by air, one must have a seat which he ordinarily reserves in advance. When a reservation holder cancels or fails to show, there is usually no one there to take the seat. The significant statistic is the load factor, or percentage of occupied seats, rather than the total of empty seats.

We are not given the load factors for all flights throughout the year of 1967. Trans-Texas gives us no load factors. Both Trans-Texas and Braniff only give us figures for one month, that of January, 1968. January is admittedly a poor month for air travel. All flights are lumped together so that we cannot tell the experience during peak traffic hours. Braniff had an average 54.1% load factor between Dallas/Ft. Worth and Houston and an average 61% load factor between Dallas Ft. Worth and San Antonio during January 1968. This average includes all flights, at any hour and on every day of the week.

Though these January load factors were picked by the CAB carriers for purposes of their argument, the percentages are not so low as to give force to that argument. Seventy percent is considered a high load factor by air carriers, and when all flights are considered no airline in the nation shows so high a factor.

Four out of the seven public witnesses testifying for Air Southwest expressed strong dissatisfaction with the ground service of the CAB carriers. They complained that baggage did not arrive, that reservations required too much time to obtain, and that the procedure at the check-in counters was consistently slow and tedious. When they desired only to take a flight on one of these routes, they were required to stand in line and wait for long periods while some person in front of them planned a complicated itinerary with connecting flights and while elaborate information was written on the CAB ticket form for each person in the line.

ADMISSIBILITY OF SURVEY OF PUBLIC ATTITUDE

Air Southwest offered in evidence the results of a poll or survey of the "Attitudes of travelers toward Air Southwest's proposed service," which was taken in October of 1967. We disagree with the trial court's ruling that the survey results were inadmissible. Mr. Walter Bowles, who had directed the survey, testified as to its planning and results. Mr. Bowles has some twenty years of experience in this field and has supervised more than 2,000 surveys of public opinion. Since he testified about this survey at the hearing before the Texas Aeronautics Commission, and there presented his work papers, the CAB carriers had full opportunity to investigate and develop any particular objections they might have as to the methodology and execution of the poll. Three of the interviewers employed by Mr. Bowles were presented to testify in the trial court, and the opponents could have obtained testimony from other interviewers had it been significant to them.

Insofar as the poll tested the attitude of satisfaction or dissatisfaction with existing air travel service in these markets, the evidence is admissible whether it is considered to be nonhearsay or within the state of mind exception of the hearsay rule. *See* generally: Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Note, 66 Harvard L. Rev. 498 (1953); Anno: Admissibility and weight of surveys or polls or consummer's opinion, recognition, preference, or the like, 76 A. L.R. 2d 619 (1961). The more the question and answer move into the realm of opinion or risk the hearsay dangers, the less acceptable they become as evidence. Five hundred air travelers were questioned at airports at the three cities which Air Southwest seeks to serve. They were asked to rate existing airline service as either "excellent," "good" or "not so good." Taken literally, this may be considered entirely objectionable as eliciting only opinion of the interviewees, but the response may also be construed as no more than personal attitude towards existing service.

When Air Southwest had completed its offer of proof or "bill of exception" in connection with this survey, the attorney for Trans-Texas sought to cross-examine Mr. Bowles and to refute Air Southwest's contentions as to the weight to be given the survey in the event the appellate court disagreed, as we do, with the trial court's ruling as to its admissibility. The trial court would not permit this and proceeded as if it were the usual type of trial where fact issues are determined at that stage and as though the case would be remanded for new trial in the event of a different holding on the admissibility of evidence. Since substantial evidence review presents only a question of law, and the issues are not constricted by an appeal, the trial court should have allowed rebuttal proof in this instance in order to avoid that possibility of retrial.

The denial of this effort to cross-examine and to undermine the weight of the survey prevents us from considering it as support for the Commission's order. Since we find sufficient support elsewhere in the record, there is no need for further development of the evidence as to the survey.

THE AIR SOUTHWEST PROPOSAL

We now turn to the present means and proposed operations of the applicant. The record shows that Air Southwest has made careful plans for its operations, and its financial responsibility cannot be disputed. An agreement was reached with American Airlines for the purchase of the Electra aircraft and for payment over a period of five years. Arrangements were made for their maintenance by American Flyers Airlines of Ardmore, Oklahoma. Officials of Allstate Insurance Company testified as to their willingness to pay $3,000,000 for preferred stock. An additional $2,000,000 has been obtained by private stock sales or will be obtained according to subscriptions in hand.

Air Southwest will offer a type of service to travelers between these cities which the Commission could well have decided would present considerable appeal. The Air Southwest flights will be scheduled and designed only for non-stop passage from one of these Texas cities to another. Air Southwest will not arrange for reservations on connecting flights; it will only fly the single stage. While this may remove Air Southwest from competition for the passenger traveling further, it will enjoy advantages for the commuter by simplification of reservations, ticketing, baggage handling and boarding.

Any baggage on board when the plane lands will be taken off, and there will be no chance of it being carried to or removed at the wrong airport. Since no reservations or ticketing will be required for anything except the one stage, these procedures will be considerably simplified and the passenger may pay his fare and go on board without waiting. Better schedule performance is promised because the weather and traffic congestion of New York, Chicago or Denver will not affect Air Southwest's operations as they do the flights of CAB carriers having to come from those cities. All of the above should cut down on the total trip time of the traveler.

Air Southwest's fares will be substantially lower than that of the CAB carriers: The Dallas Ft. Worth-Houston

Air Southwest fare will be $14.95 as compared with the competition's $19.00; Dallas Ft. Worth-San Antonio fare will also be $14.95 compared with $19.00; San Antonio-Houston Air Southwest fare will be $12.95 as compared with the competition's $17.00.

Additional flights will be provided in all of these markets at the times most needed by the public.

Charles W. Pope, Sr. of San Antonio and Alan G. Kenison and James E. Thompson of California, all expert witnesses for Air Southwest, testified as to the successful experience of similar service by Pacific Southwest Airlines and Air California, flying between San Francisco and Los Angeles. Whereas the size of the market there may not be comparable to these in Texas, it is significant that the carrier in that market providing this limited stage flight without interstate connections or CAB regulation, and at a lower fare, has so attracted the public as to become prominent if not dominant in the market served. CAB statistics and the three expert witnesses prove this to be the fact.

Since the record reasonably supports the order of the Texas Aeronautics Commission of February 20, 1968, it is entitled to be given full effect. The judgments of the trial court and court of civil appeals are reversed; judgment is here rendered denying the injunction and all relief sought by respondents.

APPENDIX G

Order of the Supreme Court of Texas Entered June 17, 1970, Overruling Respondents' Motion for Rehearing

SUPREME COURT OF TEXAS

No. B-1552.

The Texas Aeronautics Commission et al

v.

Braniff Airways, Inc. et al.

From Travis County, Third District.

June 17, 1970.

Motion for rehearing on behalf of Braniff and Trans-Texas Airways and motion for rehearing on behalf of Continental Air Lines, Inc., filed respectively here on May 28, 1970, having been duly considered, it is ordered that said motions be, and hereby are, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of The Texas Aeronautics Commission et al. vs. Braniff Airways, Inc. et al., No. B-1552, From Travis County, Third District, as such order appears in the minutes of said Court under the date of June 17, 1970.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas at the City of Austin, on this 4th day of September, 1970.

GARSON R. JACKSON,
CLERK

EUGENE CERVENKA

By Eugene Cervenka, Deputy

H-1

NO. B-1552

In The

SUPREME COURT OF TEXAS

TEXAS AERONAUTICS COMMISSION, ET AL,
Petitioners,

v.

BRANIFF AIRWAYS, INC., ET AL,
Respondents.

ON WRIT OF ERROR TO THE
COURT OF CIVIL APPEALS

ON PETITION FOR REHEARING

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

John H. Crooker, Jr.

H-2

IN THE SUPREME COURT OF TEXAS

NO. B-1552

TEXAS AERONAUTICS COMMISSION, ET AL,
Petitioners,
v.
BRANIFF AIRWAYS, INC., ET AL,
Respondents.

ON PETITION FOR REHEARING

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE STATE OF TEXAS:

NOW COMES John H. Crooker, Jr., former Chairman of the Civil Aeronautics Board, in his individual capacity, and files this his Motion for Leave to File Brief as Amicus Curiae in the event any party in the captioned proceeding seeks rehearing of this Court's Opinion, dated May 13, 1970, a copy of said Brief being attached hereto as Exhibit "A".

I.

Movant seeks to file his Amicus Curiae Brief to bring to the attention of this Honorable Court a mistaken impression apparently existing in the Court's mind, as reflected by one sentence of the Court's Opinion in the captioned case, indicating a possible negative inference by the

Court because of the Civil Aeronautics Board's failure to take part in the hearing before the Texas Aeronautics Commission.

WHEREFORE, Movant prays that if a Motion for Rehearing in the captioned case is filed by any party to such case, his Motion for Leave to Five Amicus Curiae Brief be granted and that the Court accept such Amicus Curiae Brief which is attached hereto as Exhibit "A", on the limited point of the weight and effect to be given to the failure or disinclination of the Civil Aeronautics Board to participate in proceedings before the State Agency.

Respectfully submitted,

JOHN H. CROOKER, JR.

John H. Crooker, Jr.

H-4

IN THE SUPREME COURT OF TEXAS

NO. B-1552

TEXAS AERONAUTICS COMMISSION, ET AL,
Petitioners

v.

BRANIFF AIRWAYS, INC., ET AL,
Respondents.

ON WRIT OF ERROR TO THE
COURT OF CIVIL APPEALS
ON PETITION FOR REHEARING
AMICUS CURIAE BRIEF

TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

NOW COMES John H. Crooker, Jr. and submits this, his Brief as Amicus Curiae, in the above captioned proceeding on Motion for Rehearing. This Brief is directed to one sentence in the Court's Opinion issued in this cause, and is not directed in support of the position of any party to this case.

INTEREST OF AMICUS CURIAE

The Amicus Curiae is an individual and was formerly Chairman of the Civil Aeronautics Board ("CAB"). The problem of state agency jurisdiction in connection with the award of air routes to intrastate carriers, especially when competing on a head-to-head basis with CAB certificated carriers, is one of vital interest to the public at large, the State of Texas, its agencies, the CAB, the carriers involved and the Amicus Curiae herein, as a former Chairman of the CAB and as an individual citizen concerned with this problem.

STATEMENT OF CASE

This case arose out of a decision of the Texas Aeronautics Commission ("TAC") granting operating authority to Air

Southwest ("ASW") between certain points wholly within the State of Texas. Three certificated carriers operating in interstate commerce and subject to regulation by the CAB (Trans Texas, Braniff and Continental) opposed the ASW application and appealed the decision of the TAC to the District Court of Travis County, Texas, which Court set aside the decision of the TAC. The Court of Civil Appeals affirmed the judgment of the lower Court. On May 13, 1970, this Court issued its decision reversing the judgment of the Court of Civil Appeals and the District Court and reinstated the TAC's award (13 Tex. Sup. Ct. J. 329).

In its Opinion, this Court stated: "A copy of the Air Southwest application was served upon the CAB, as required by the Rules of the Texas Aeronautics Commission, but the CAB has taken no part in the matter." (13 Tex. Sup. Ct. J. at 330). It is to this sentence that the Amicus Curiae is directing his Brief and seeks, should any Petition for Rehearing be filed, reconsideration or revision by this Court.

DISCUSSION

As a former CAB Chairman and an individual with an interest in the problems of intergovernmental relations, (and possibly to assist in consideration of such matters in the future) the attention of the Court is invited to the rather unhappy dilemma facing the CAB in deciding whether to participate in or ignore a proceeding before any state agency such as the TAC. Aside from budgetary problems and manpower problems facing the CAB in its consideration of whether or not to participate in any State proceeding, certain other procedural problems are connected with such decision. If the CAB appears before a state agency and presents its views to the agency, this makes the state agency the judicial tribunal and the CAB a party or a witness or both. The CAB is thus present before the state agency, and the decision of that agency becomes even more difficult to overturn on review, even if a Court would have reached a different conclusion had the matter been considered *de novo*.

Staying out of a State proceeding, as was done in this case, has the obvious drawback of leaving the impression with a Court that the CAB is not concerned about the possibility that too much competition may adversely affect the financial viability of a certificated carrier (especially a subsidized one). Such matters, of course, might have some adverse effect on the development of the Nation's air transportation system.

The difficulty of the dilemma facing the CAB is apparent from a review of *People v. Western Air Lines*, 268 P. 2d 723 (Cal. 1954), in which the Court (at Page 738) alluded to one phase of the matter in which the CAB "apparently did not have sufficient interest to intervene," and at the same time alluded to another phase of the matter in which the CAB did intervene and in which the California Public Utilities Commission reached a conclusion at variance with what was the apparent CAB conclusion as to the amount which should be charged for air transportation between Los Angeles and San Francisco.

It is respectfully urged that if any Motion for Rehearing is filed, the Court indicate its awareness of the dilemma which confronts the CAB in matters of this sort and further indicate that no inference should be drawn from the failure of the CAB to intervene or participate in any proceeding before the State Agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John H. Crooker, Jr., do hereby certify that on this 6th day of July, 1970, copies of the foregoing Motion and Amicus Curiae Brief were served on the following parties

through their Attorneys of Record by mailing a copy of same to them through the United States mail, postage prepaid:

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